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Report
# of the Human Rights Committee

Volume II

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Official Records
Fifty-eighth session
Supplement No. 40 (A/58/40)

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Report of the Human Rights Committee

Volume II

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NOTE

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Annex V

VIEW OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Communication No. 726/1996, *Zheludkov v. Ukraine**
(Views adopted on 29 October 2002, seventy-sixth session)

Submitted by:	Mrs. Valentina Zheludkova (represented by counsel Mr. Igor Voskoboinikov)
Alleged victim:	Alexander Zheludkov
State party:	Ukraine
Date of communication:	28 March 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 October 2002,

Having concluded its consideration of communication No. 726/1996, submitted to the Human Rights Committee on behalf of Mr. Alexander Zheludkov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, and Mr. Maxwell Yalden.

The text of four individual opinions by Committee members Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Cecilia Medina Quiroga and Mr. Rafael Rivas Posada are appended to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mrs. Valentina Zheludkova, Ukrainian national of Russian origin. She submits the communication on behalf of her son, Alexander Zheludkov, an Ukrainian national of Russian origin, at the time of the submission detained in an Ukrainian prison. She claims that her son is a victim of violations of articles 2, 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights. The author is represented by counsel.[1]

Facts as submitted by the author

2. The author states that her son was arrested on 4 September 1992 and was charged, alongside two other men, with the rape of a minor, a 13-year-old girl, H.K. The rape was alleged to have occurred on 23 August 1992. On 28 March 1994, the author's son was convicted by the Ordzhonikidzevsky District Court (Mariupol) and sentenced to seven years' imprisonment. His appeal to the Donetsk Regional Court was dismissed on 6 May 1994. His subsequent appeal to the Supreme Court of Ukraine was dismissed on 28 June 1995.

Complaint

3.1 The author claims that her son is a victim of a violation of articles 7 and 10 of the Covenant on the ground that, both on the date of his arrest and on other occasions before his trial, he was severely ill-treated and because of the inhuman conditions of detention. With regard to the first ground, she states, in particular, that on 4 September 1992, her son was brought to a police station to give evidence as a witness in a case concerning a theft. She states that at the police station he was taken to a room where he was severely beaten with metal objects by several policemen for many hours. Her son identifies one of the assailants as Mr. K., a police captain and father of the victim of the alleged rape. The author further claims that Mr. K. forced her son to write a confession to the alleged rape. She explains that he declined to make any complaints to a man in civilian dress who subsequently came into the interrogation room to ask him some questions, fearing that he would be beaten again if he complained. The author claims that her son has suffered serious injuries as a result of the beatings and states that he is still in bad health. In particular, he suffered severe damage to his left eye. She supplies no medical evidence, since her son has no access to his medical records. However, she provides a report by a doctor of the institution where her son was detained, which shows that he did complain to the doctor about the state of his eye. Furthermore, she has put before the Committee an extensive series of medical records aimed at showing that he was in good health until 1992.

3.2 With regard, in particular, Mr. Zheludkov's physical condition while detained and the lack of medical attention in the institution in which he was detained, the author also alleges that her son at one time suffered from methane poisoning, but that her efforts to secure medicine for him were hindered. With regard to the conditions of detention in general, the author states that the institution is severely overcrowded and that there is an alarming shortage of food, medicaments and other "absolutely essential things".

3.3 The author also alleges that her son is a victim of a violation of articles 9, paragraph 2, and 14, paragraph 3, as, during the first 7 days of detention after his arrest he was not given access to a lawyer, and because he was not charged with the crimes until 50 days after the arrest.

3.4 The author alleges that her son's right to a fair trial, as provided for in article 14, paragraph 1, was violated in the proceedings against him. The author again invokes that her son's confession was coerced and also claims that the remaining evidence against him was fabricated to cover up a previous crime - a burglary of his apartment by Mr. K.'s daughter (the victim of the rape) and another woman. Also with regard to the trial, the author alleges that her son was deprived of the chance to examine a witness at his trial.

3.5 The author states that all available domestic remedies have been exhausted. With regard to the conviction and sentence for rape, reference is made to the trial and the unsuccessful appeals mentioned in paragraph 2 above. With regard to the alleged beatings of Mr. Zheludkov, the author's representatives claim that they petitioned both the courts and the prosecuting authorities several times from 1992 to 1994, but that the prosecuting authorities refused to institute criminal proceedings against the alleged assailants. Copies of their letters and petitions have been forwarded to the Committee.

State party's submission and author's comments thereon

4.1 In its submission of 21 April 1997, the State party merely replies that the arguments of the author that her son did not take part in the crime that his interrogation was conducted by impermissible means, that he was slanderously accused of the offence and that the investigating authorities and the court broke the law have been examined and found groundless and that his criminal acts were correctly assessed and his punishment was determined in the light of the public danger represented by the crimes committed and of information about his character.

4.2 In her letter of 15 September 1997, the author offers no further comments on the communication or on the State party's submission, and requests the Committee to proceed with the examination of the admissibility of the communication.

Decision on admissibility

5.1 On 7 March 1999, the Committee, acting through its Working Group, pursuant to Rule 87, paragraph 2, of its rules of procedure, examined the admissibility of the communication.

5.2 The Committee ascertained, in accordance with article 5, paragraph 2 (a) of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation. Similarly, the Committee found that the author had exhausted domestic remedies for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

5.3 Concerning the author's claim that her son was beaten by police officers upon his arrest in September 1992 and that his confession was coerced, the Committee noted that although the allegations had not been explicitly refuted by the State party, the judgement from the court of first instance revealed that the author's allegations were examined by the court, which found them groundless. As to the prosecution's refusal to initiate criminal proceedings against the alleged assailants, the Committee noted that the prosecution examined the author's request and that they concluded that there was no basis for opening proceedings. In the absence of a clear showing of partiality or misconduct by the court or the prosecuting authorities, the Committee was not in a position to question their evaluation of the evidence and found that this part of the communication was inadmissible under article 2 of the Optional Protocol.

5.4 Similarly, the Committee found that the author's claim of a violation of article 14 on the ground that the evidence against her son was fabricated, was likewise inadmissible under article 2 of the Optional Protocol as the author had not substantiated a claim of bias or misconduct by the court.

5.5 With regard to the alleged violations of article 14, paragraph 3, on the ground that Mr. Zheludkov had been deprived of the opportunity to examine a witness during the trial, the Committee noted that the author did not raise this issue on appeal. The Committee therefore held this part of the communication inadmissible under article 2 of the Optional Protocol, because the author had failed to substantiate sufficiently her claim for the purposes of admissibility.

5.6 The Committee noted the author's allegation that her son was not charged until 50 days after the arrest and that it appeared that he was not brought before a competent judicial authority in this period. The Committee considered that this may raise issues under article 9, paragraphs 2 and 3, and held the communication admissible under both of these provisions.

5.7 With regard to the alleged violations of article 10, paragraph 1, on the ground of the conditions of detention in general and the lack of medical attention in particular, the Committee noted the author's assertion that her son was denied access to his medical records and that the State party did not refute any of the author's allegations in this respect. The Committee held that this claim had been substantiated sufficiently to be considered on the merits.

5.8 The Human Rights Committee therefore decided, on 7 March 1999, at its sixty-fifth session, that the communication was admissible insofar as it might raise issues under articles 9, paragraphs 2 and 3, and 10, paragraph 1, of the Covenant.

The State party's observations on the merits

6.1 In its observations on the merits dated 26 December 1999, the State party informed the Committee that, following the decision on admissibility, the Public Prosecutor's Office of Ukraine conducted an inquiry. It was established that Mr. Zheludkov had been arrested on 4 September 1992 and that on 7 September 1992 he was placed in pre-trial detention by decision of the Public Prosecutor's Office. Mr. Zheludkov was charged on 14 September 1992, within the 10-day limit provided for charges to be brought after determination of the preventive measure, as stated in article 148 of the Code of Criminal Procedure. The State party contends that, in view of the foregoing, the allegation referred to in the decision on admissibility to the effect that Mr. Zheludkov was not charged until 50 days after the arrest, did not reflect the actual situation.

6.2 The State party affirms that the decision to bring criminal proceedings against Mr. Zheludkov was verified by the Public Prosecutor's Office on several occasions. During the preliminary investigation and trial, he was held at Mariupol detention centre. His file and medical records indicate that he was admitted on 14 September 1992 and underwent a medical examination. When the doctors questioned him about his state of health, he allegedly replied that he had had Botkin's disease (epidemic infectious jaundice) in 1983 and that in 1986 he had been operated on for an abdominal perforation with haemorrhaging in the right chest area.

Reportedly he neither complained about his health nor lodged a formal complaint to the effect that he had been beaten during questioning. The medical examination found him to be in good health. On arriving at the centre he was given a mattress, pillow, quilt and sheets, as well as cutlery and a bowl. He was assigned a place to sleep and fed according to accepted standards. During his stay in the centre from 14 September 1992 to 27 May 1994, he did not complain to the administration about either his conditions of detention, food or medical care. He did not contact the medical service until 2 February 1994, when he complained of loss of vision in his left eye. The doctor's diagnosis was myopia. The reasons for the loss of vision did not appear in the medical records and Mr. Zheludkov did not consult the doctor on that matter again.

6.3 The State party maintains that owing to the time elapsed, it was not possible to determine whether Mr. Zheludkov, his counsel or his mother petitioned the centre's administration to issue a certificate attesting to Mr. Zheludkov's state of health or enable him to consult his medical records. However, as a result of a procedure initiated by his mother, a copy of a medical certificate concerning Mr. Zheludkov's state of health, drawn up on 2 March 1994 at the request of his counsel and signed by the centre's doctor, was found in the files of the Public Prosecutor's Office. The certificate reads as follows: *In reply to your request of 22 February 1994, may I inform you that Mr. Zheludkov has been registered with the medical service of medical establishment Yu-Ya 312/98 since 14 November 1992. He has lodged no complaint concerning his state of health. He was found to have an internal cutaneous haemorrhage in the right chest area. According to his medical history he had Botkin's disease in 1983 and was operated on in 1986. Currently complains of loss of vision in his left eye. The establishment is not in a position to determine his level of myopia.* The State party argues that the information contained in the certificate fully corresponds to the contents of the medical record and that this refutes the arguments to the effect that Mr. Zheludkov was not allowed to consult his medical records.

6.4 In accordance with a request by Mr. Zheludkov's present counsel concerning his state of health, medical tests were allegedly ordered. He was sent to the interregional prison hospital for diagnosis of after-effects of methane poisoning (1986),[2] with vasomotor cephalalgia, chronic bronchitis, vegetative asthenic syndrome and loss of vision in the left eye. He allegedly remained in observation in the hospital from 31 October to 14 November 1994, during which period he received appropriate medical care. He left the hospital with the following diagnosis: residual effect from hydrocarbon poisoning, toxic encephalopathy, moderate asthenic syndrome and chronic bronchitis in remission. Examinations by a neuropathologist and a therapist were allegedly recommended, and Mr. Zheludkov was declared fit to work.

6.5 The State party goes on to say that during his period in prison from 27 May 1994 to 29 December 1998 Mr. Zheludkov requested medical care on various occasions for various reasons,[3] and stresses that at no time between his arrest and his release did he complain of failure to receive medical care or of the quality of the medical care he received.

6.6 The State party accordingly concludes that the information contained in the decision on admissibility regarding the unsatisfactory conditions of detention in the Mariupol pre-trial detention centre and the failure to provide medical care in the places where Mr. Zheludkov was held during the investigation and in prison, with denial of access to his medical file, should be considered insufficiently substantiated.

Author's comments on the State party's observations

7.1 In her comments, dated 27 January 2001, the author states that the State party, in its observations, did not refute the argument to the effect that her son had not been brought before a competent judicial authority until 50 days after his arrest. Article 148 of the Code of Criminal Procedure allegedly contains no deadline for informing people of the charges against them.[4] The State party's statement to the effect that the author was charged on 14 September is unsubstantiated by documentary evidence and, accordingly, a fabrication. The author goes on to say that article 155 of the Code of Criminal Procedure stipulates that a person cannot be held in custody for more than three days, after which he or she must be transferred to a detention centre. The only exceptions are cases where no detention centre exists or where transfer is impossible due to poor road conditions. The author's son, however, was detained near Mariupol, where there is a detention centre. The author concludes by saying that conditions of detention were poor since the detention centre was not designed to hold people for a period of more than 3 days, whereas he had stayed there for 10 days.

7.2 The author states that the detention centre did not receive the same medical documentation as that available during the preliminary investigation. She therefore maintains that documents were missing. The file allegedly contains the conclusions of a medical examination which he underwent at his own request, in connection with his statement that he had been beaten. Documents attesting to his state of health after his poisoning[5] and other documents are also allegedly missing. The result, according to the author, was to deprive her son of adequate medical assistance during those periods.

7.3 The author attaches copies of documents showing that counsel asked to consult Mr Zheludkov's medical file on several occasions without success.[6] In the author's view, the State party's statement to the effect that it was not able to determine whether Mr. Zheludkov, his counsel or his mother petitioned the centre's administration to issue a certificate attesting to Mr. Zheludkov's state of health or enable him to consult his medical records can no longer be maintained.

Issues and proceedings before the Human Rights Committee

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee must decide whether the State party violated Mr. Zheludkov's rights under articles 9, paragraphs 2 and 3, and article 10, paragraph 1 of the Covenant. The Committee notes the author's claim that her son was held for more than 50 days without being informed of the charges against him and that he was not brought before a competent judicial authority during this period, and further, that medical attention was insufficient, and that he was allegedly denied access to the information in his medical records.

8.3 The Committee notes the information provided by the State party to the effect that, after Mr. Zheludkov's arrest on 4 September 1992 on suspicion of having participated in a rape, his detention was extended by approval of the competent prosecutor in the Novoazosk district on 7 September 1992, and that he was charged on 14 September 1992 - within the legally prescribed 10-days period. It also notes the author's allegations that her son was not informed of the precise charges against him until he had been in detention for 50 days and that he was not brought before a judge or any other official empowered by law to exercise judicial functions during this period. The State party has not contested that Mr. Zheludkov was not brought promptly before a judge after he was arrested on a criminal charge, but has stated that he was placed in pre-trial detention by decision of the procurator (*prokuror*). The State party has not provided sufficient information, showing that the procurator has the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3 of the Covenant. The Committee therefore concludes that the State party violated the author's rights under paragraph 3 of article 9 of the Covenant.

8.4 With regard to the alleged violation of article 10, paragraph 1, in respect of the alleged victim's treatment in detention, in particular as to his medical treatment and access to medical records, the Committee takes note of the State party's reply, according to which Mr. Zheludkov received medical care and underwent examinations and hospitalization during his stay in the centre and the prison, and that a medical certificate based on the medical records was issued, upon request, on 2 March 1994. However, these statements do not contradict the argument presented on behalf of the alleged victim that despite repeated requests, direct access to the actual medical records was denied by the State party's authorities. The Committee is not in a position to determine what the relevance of the medical records in question would be for the assessment of the conditions of Mr. Zheludkov's detention, including medical treatment afforded to him. In the absence of any explanation for such denial, the Committee is of the view that due weight must be given to the author's allegations. Therefore, in the circumstances of the present communication, the Committee concludes that the consistent and unexplained denial of access to medical records to Mr. Zheludkov must be taken as sufficient ground for finding a violation of article 10, paragraph 1, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of paragraph 3 of article 9, and paragraph 1 of article 10, of the International Covenant on Civil and Political Rights.

10. The Committee is of the view that Mr. Zheludkov is entitled, under article 2, paragraph 3 (a) of the Covenant, to an effective remedy, entailing compensation. The State party should take effective measures to ensure that similar violations do not recur in the future, especially by taking immediate steps to ensure that the decisions concerning the extension of custody are taken by an authority, having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3 of the Covenant.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a

violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The International Covenant on Civil and Political Rights entered into force for Ukraine on 23 March 1976, and the Optional Protocol on 25 October 1991

[2] As a result of a work accident.

[3] The State gives the dates of the different reasons for medical visits of Mr. Zheludkov: bronchitis, broken tibia, generalized weakness, pains in the chest area, urinary system problems and haemorrhoids.

[4] The author attaches the Ukrainian text of the law. Article 148, paragraph 4, of the Code of Criminal Procedure reads as follows: "In exceptional cases, for persons suspected of having committed a crime a preventive measure may be imposed before the charges against them have been brought. In such cases the charges must be brought no later than 10 days from the time when the preventive measure is taken. If the charges are not brought within this time period, the preventive measure shall be annulled."

[5] The author does not indicate the type of poisoning involved; she is apparently referring to her son's methane poisoning in 1986.

[6] Three refusals, addressed to counsel. The first, dated 31 October 1994, is the administration's refusal to authorize counsel access to the file on the ground that the detainee was due to be transferred that day to the interregional hospital for tests and that his file was to be sent with him. The second document, dated 30 September 1994, is a reply from the detention centre, explaining that it cannot give access to the medical records, as the detainee has been transferred to prison, together with his file, and indicating only the information in its possession in the centre's register, to the effect that a commission of experts examined the author's son and concluded that he left the centre in good health. The third refusal, dated 5 January 1995, is a reply by the Ministry of the Interior to the author's son's counsel at the time, explaining that the Ministry of the Interior cannot authorize access to medical records, such authorization being the prerogative of the courts.

APPENDIX

Individual opinion by Committee member Mr. Nisuke Ando

I concur with the Committee's finding that the State party violated the author's son's rights under article 9, paragraph 3, of the Covenant (8/3). However, I find a difficulty in sharing the Committee's finding that the consistent and *unexplained* denial by the State party of access to the son's medical records constitutes a violation of article 10, paragraph 1 (8.4).

For one thing, the State party does explain that, as a result of a procedure initiated by his mother and at the request of his counsel, a medical certificate concerning the son's state of health was drawn up and signed by the centre's doctor and that the information contained in the certificate fully corresponds to the contents of the medical records (6.3). For another, the Committee admits that it is not in the position to determine what the relevance of the medical records in question would be for the assessment of the conditions of the son's detention, including medical treatment afforded to him (8.4).

I do think that the State party should make the medical records available to the son. Nevertheless, I am unable to convince myself that the denial of access to the medical records, as such, constitutes a violation of article 10, paragraph 1, by the State party in the instant case.

(*Signed*): Nisuke Ando

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Individual opinion by Committee member Mr. P.N. Bhagwati

I have had the opportunity to read the views expressed by the majority of members of the Committee. While I agree with the majority, in finding that there was a violation by the State party of the author's son's rights under article 9, paragraph 3 of the Covenant, I am unable to agree with the finding reached by the majority that the consistency and unexplained denial by the State party of access to the medical records of her son, constituted a violation of article 10, paragraph 1 of the Covenant.

The State Party has averred in paragraph 6.3 of the communication that as a result of a procedure initiated by the author a copy of a medical certificate concerning her son's state of health, drawn up on 2 March 1994 at the request of her counsel and signed by the doctor of the detention centre, was made available to her and that the information contained in this medical certificate fully corresponded to the contents of the medical records. This averment has not been denied or disputed by the author. It is in the circumstances difficult to appreciate or determine what more information about her son's health or physical condition could have been obtained by the author by having access to the medical records and how the denial of such access prevented her from being able to establish a violation of her son's rights under article 10, paragraph 1. I am of the view that, in any event, denial of access to medical records could not by itself constitute a violation of article 10, paragraph 1, for access to medical records could only be intended to obtain evidence for establishing a violation of article 10, paragraph 1 and refusal to make such evidence available could not be regarded as constituting a violation of that article.

I am accordingly unable to agree with the majority that the denial of access to the medical records constitutes a violation of article 10, paragraph 1 of the Covenant.

(*Signed*): P.N. Bhagwati

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Individual opinion by Committee member Ms. Cecilia Medina Quiroga

I concur with the Committee's decision in this case, but differ on the reasoning behind it with regard to the existence of a violation of article 10, paragraph 1, of the Covenant, as set out in paragraph 8.4 of the Committee's Views.

I consider that the Committee's reasoning excessively restricts the interpretation of article 10, paragraph 1, by linking the violation of that provision to the possible relevance which the victim's access to the medical records might have had for the medical treatment that he received in prison, in order to assess "the conditions of Mr. Zheludkov's detention, including medical treatment afforded to him".

Article 10, paragraph 1, requires States to treat all persons deprived of their liberty "with humanity and with respect for the inherent dignity of the human person". This, in my opinion, means that States have the obligation to respect and safeguard all the human rights of individuals, as they reflect the various aspects of human dignity protected by the Covenant, even in the case of persons deprived of their liberty. Thus, the provision implies an obligation of respect that includes all the human rights recognized in the Covenant. This obligation does not extend to affecting any right or rights other than the right to personal liberty when they are the absolutely necessary consequence of the deprivation of that liberty, something which it is for the State to justify.

A person's right to have access to his or her medical records forms part of the right of all individuals to have access to personal information concerning them. The State has not given any reason to justify its refusal to permit such access, and the mere denial of the victim's request for access to his medical records thus constitutes a violation of the State's obligation to respect the right of all persons to be "treated with humanity and with respect for the inherent dignity of the human person", regardless of whether or not this refusal may have had consequences for the medical treatment of the victim.

(*Signed*): Cecilia Medina Quiroga

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion by Committee member Mr. Rafael Rivas Posada

I agree with paragraph 8.3 of the decision, which concludes that the State party violated the rights of the author's son under article 9, paragraph 3, of the International Covenant on Civil and Political Rights, but I disagree with the part of paragraph 8.4 of that decision which concludes that the denial of access to medical records to Mr. Zheludkov constitutes a sufficient ground for finding a violation of article 10, paragraph 1, of the Covenant.

Firstly, I do not find that the author's complaint that the authorities had unjustly withheld her son's medical records, which, according to her, had been requested several times, is sufficiently substantiated. It is true that, on two occasions, 30 September and 31 October 1994, the authorities replied that it was not possible to provide them, the first time because the detainee had been transferred to prison together with his file and the second time because, on that day, the detainee had been taken to hospital for tests and his medical records were thus needed. The third reply to the author's request, from the Ministry of the Interior, explained that such authorization was the prerogative of the courts. On the face of it, none of these replies seems to be unfounded. Moreover, the authorities issued a medical certificate on 2 March 1994 which, they maintain, contained all the information relating to his medical record. That assertion by the State party was not contradicted by the author, who never claimed in her complaint that her son had suffered harm for not having had at his disposal medical records about whose existence at any time we cannot be absolutely certain.

Secondly, a person's medical or clinical records are merely a means or instrument for facilitating medical treatment or care which should be based on them. They are not an end in themselves, but a means of achieving a result, namely, preserving or restoring a person's health.

In the present case, the State party maintained that it had given Mr. Zheludkov proper medical attention and, in paragraph 8.4, the Committee does not refer to the absence of medical attention as the ground for the violation of article 10, paragraph 1, of the Covenant, but only to the denial of access to medical records. I find it contradictory to say that the refusal to provide the alleged documents containing the medical records, which were supposedly needed for the attention that the detainee required, constitutes a violation of the Covenant and, at the same time, to recognize implicitly that the medical care was adequate, since the author did not base her complaint on that aspect.

Lastly, but not least importantly, because this consideration is the key point of this dissenting opinion, even if the importance of the possession of medical records was independent of the medical attention to which a detainee is entitled, I do not agree that the interpretation of article 10, paragraph 1, of the Covenant should be stretched that far. To conclude that the denial of access to medical records to a person deprived of his liberty, assuming such denial is proved, constitutes "inhuman" treatment and is contrary to "respect for the inherent dignity of the human person" goes beyond the scope of the said paragraph and runs the risk of undermining a fundamental principle which must be above whimsical interpretations.

For the reasons stated, I disagree with the part of paragraph 9 of communication No. 726/1996 that refers to article 10, paragraph 1, of the Covenant as having been violated by the State party.

5 November 2002

(*Signed*): Rafael Rivas Posada

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

B. Communication No. 757/1997, *Pezoldova v. The Czech Republic* (Views adopted on 25 October 2002, seventy-sixth session)*

Submitted by: Mrs. Alzbeta Pezoldova (represented by counsel Lord Lester of Herne Hill, QC)

Alleged victim: The author

State party: The Czech Republic

Date of communication: 30 September 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 2002,

Having concluded its consideration of communication No. 757/1997, submitted to the Human Rights Committee by Mrs. Alzbeta Pezoldova under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mrs. Alzbeta Pezoldova, a Czech citizen residing in Prague, Czech Republic. She claims to be a victim of violations of articles 26, 2 and 14, paragraph 1, of the International Covenant on Civil and Political Rights by the Czech Republic. She is represented by counsel. The Covenant entered into force for Czechoslovakia in March 1976, the Optional Protocol in June 1991.[1]

The facts as submitted by the author

2.1 Mrs. Pezoldova was born on 1 October 1947 in Vienna as the daughter and lawful heiress of Dr. Jindrich Schwarzenberg. The author states that the Nazi German Government had confiscated all of her family's properties in Austria, Germany, and Czechoslovakia, including an estate in Czechoslovakia known as "the Stekl" in 1940. She states that the property was confiscated because her adoptive grandfather Dr. Adolph Schwarzenberg was an opponent of Nazi policies. He left Czechoslovakia in September 1939 and died in Italy in 1950. The author's father, Jindrich, was arrested by the Germans in 1943 and imprisoned in Buchenwald from where he was released in 1944. He went into exile in the United States and did not return to Czechoslovakia after the war.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, and Mr. Maxwell Yalden.

The text of two individual opinions by Committee members Mr. Nisuke Ando and Mr. Prafullachandra Natwarlal Bhagwati is appended.

2.2 After the Second World War, the family properties were placed under National Administration by the Czechoslovak Government in 1945. Pursuant to the Decrees issued by the Czechoslovak President Edward Benes, No. 12 of 21 June 1945 and No. 108 of 25 October 1945, houses and agricultural property of persons of German and Hungarian ethnic origin were confiscated. These Decrees were applied to the Schwarzenberg estate, on the ground that Schwarzenberg was an ethnic German, notwithstanding the fact that he had always been a loyal Czechoslovak citizen and defended Czechoslovak interests.

2.3 On 13 August 1947, a general confiscation law No. 142/1947 was enacted, allowing the Government to nationalize, in return for compensation, agricultural land over 50 hectares and industrial enterprises employing more than 200 workers. This law was, however, not applied to the Schwarzenberg estate because on the same day a *lex specialis*, Law No. 143/1947 (the so-called "Lex Schwarzenberg"), was promulgated, providing for the transfer of ownership of the Schwarzenberg properties to the State without compensation, notwithstanding the fact that the properties had already been confiscated pursuant to Benes' Decrees 12 and 108.[2] The author contends that Law No. 143/1947 was unconstitutional, discriminatory and arbitrary, perpetuating and formalizing the earlier persecution of the Schwarzenberg family by the Nazis. According to the author, the law did not automatically affect the previous confiscation under the Benes' Decrees. However, on 30 January 1948, the confiscation of the Schwarzenberg agricultural lands under Decrees Nos. 12 and 108 was revoked. Schwarzenberg's representative was informed by letter of 12 February 1948, and the parties were given the possibility to appeal within 15 days. The author submits therefore that the revocation only took effect after 27 February 1948 (two days after the qualifying date 25 February 1948 for restitution under Law No. 229/1991).

2.4 According to the author, the transfer of the property was not automatic upon the coming into force of Law No. 143/1947, but subject to the intabulation (writing into the register) in the public register of the transfer of the relevant rights of ownership. In this context, the author states that National Administration (see paragraph 2.2) remained in force until June 1948, and that intabulation of the properties by land offices and Courts shows that, at the time, Law No.143/1947 was not considered as having immediately transferred title.

2.5 Following the collapse of communist administration in 1989, several restitution laws were enacted. Pursuant to Law No. 229/1991,[3] the author applied for restitution to the regional land authorities, but her applications for restitution were rejected by decisions of 14 February, 20 May and 19 July 1994.

2.6 The Prague City Court, by decisions of 27 June 1994[4] and 28 February 1995,[5] refused the author's appeal and decided that the ownership of the properties had been lawfully and automatically transferred to the State by operation of Law No. 143/1947, on 13 August 1947.

Since according to restitution Law No. 229/1991 the qualifying period for claims of restitution started on 25 February 1948, the Prague City Court decided that the author was not entitled to claim restitution.[6] The Court refused the author's request to suspend the proceedings in order to request the Constitutional Court to rule on the alleged unconstitutionality and invalidity of Law No. 143/1947.

2.7 On 9 March 1995 the author's application before the Constitutional Court concerning the City Court's decision of 27 June 1994 was rejected. The Court upheld the City Court's decision that ownership had been transferred to the State automatically by operation of Law No. 143/1947 and refused to consider whether Law No. 143/1947 was unconstitutional and void. The author did not appeal the City Court's decision of 28 February 1995 to the Constitutional Court, as it would have been futile in light of the outcome of the first appeal.

2.8 According to the author, the interpretation by the Courts that the transfer of the properties was automatic and not subject to intabulation is in blatant contradiction with the contemporary records and with the text of the law itself, which show that intabulation was a necessary condition for the transfer of the property, which in the instant case took place after 25 February 1948.

2.9 The author's application to the European Commission of Human Rights on 24 August 1995 concerning her claim to restitution for the "Stekl" property and the manner in which her claim had been dealt with by the Czech Courts was declared inadmissible on 11 April 1996. The author states that the Commission did not investigate the substance of her complaint, and adds that her communication to the Human Rights Committee is different and broader in scope than her complaint to the European Commission of Human Rights.

2.10 As far as the exhaustion of domestic remedies is concerned, the author states that there are no other effective domestic remedies available to her in respect of the denial and exclusion of her claim to a remedy, whether by way of restitution or compensation, for the unlawful, arbitrary and discriminatory taking of her property and for the denial of justice in relation to her claim for such a remedy.

2.11 It appears from the submissions that the author continues to apply for restitution of different parts of her family's property, under Law No. 243/1992[7] which provides for restitution of properties confiscated under the Benes' Decrees. Such a claim was rejected by the Prague City Court on 30 April 1997, on the ground that her family's property had not been confiscated under the Benes' Decrees, but rather under Law No. 143/1947. According to counsel, the Court ignored thereby that the property had in fact been confiscated by the State under the Benes' Decrees in 1945 and that it had never been returned to the lawful owners, so that Law No. 143/1947 could not and did not operate to transfer the property from the Schwarzenberg family to the State. The Court refused to refer the issue of the constitutionality of Law No. 143/1947 to the Constitutional Court, as it held that this would have no influence upon the outcome of the case. On 13 May 1997, the Constitutional Court did not address the author's argument that Law No. 143/1947 was unconstitutional, since the Court considered that she lacked standing to submit a proposal to annul this law.

The complaint

3.1 The author claims that the continuing refusal by the Czech authorities, including the Czech Constitutional Court, to recognize and declare that Law No. 143/1947 is a discriminatory *lex specialis*, and as such null and void, constitutes a continuing arbitrary, discriminatory and unconstitutional interference with the author's right to the peaceful enjoyment of her inheritance and property, including the right to obtain restitution and compensation. Moreover, the restitution Law No. 229/1991 violates article 26 of the Covenant because it provides for arbitrary and unfair discrimination among the victims of prior confiscations of property.

3.2 In this context, the author explains that the effect of Law No. 143/1947 in conjunction with Law No. 229/1991 discriminates against her arbitrarily and unfairly by excluding her from access to a remedy for the confiscation of the property. She states that she is a victim of arbitrary differences of treatment compared with other victims of prior confiscation. In this context, she refers to the perverse interpretation of Law No. 143/1947 by the Czech courts as having effected the automatic transfer of the property to the Czech State, the refusal by the Constitutional Court to examine the constitutionality of Law No. 143/1947, the arbitrary and inconsistent interpretation of Law No. 142/1947 and Law No. 143/1947, the arbitrary choice of the qualifying date of 25 February 1948, and the confirmation by post-1991 Courts of the arbitrary distinction for the restitution of property between Law No. 142/1947 and Law No. 143/1947.

3.3 Counsel refers to a decision by the Constitutional Court, on 13 May 1997, in which it addressed the constitutionality of Law No. 229/1991 and held that there were reasonable and objective grounds for the exclusion of all other property claims simply by virtue of the fact that the law was a manifest expression of the legislator's political will to make restitution claims fundamentally conditional on the existence of the said decisive period and that the legislator intended clearly to define the time limit.

3.4 With regard to her claim that there is arbitrary and unfair discrimination between herself and the victims of confiscations of property under Law No. 142/1947, counsel explains that according to section 32 (1) of Law No. 229/1991, the taking of property under Law No. 142/1947 is invalidated, but the Czech legislator has failed to invalidate the taking of property under Law No. 143/1947. Moreover, it is said that, in respect to Law No. 142/1947, intabulation or effective taking of possession is considered by the Constitutional Court as the material date in order to establish eligibility for compensation, whereas in respect of Law No. 143/1947 the date of promulgation of the Law is taken as the material date. In this context, the author states that the county of Bohemia did not take possession of the properties before May 1948.

3.5 She also claims an arbitrary and unfair discrimination between herself and other victims of confiscations of property under the Benes' Decrees of 1945, because such victims are eligible for restitution under those Decrees and under Law No. 87/1991 and Law No. 229/1991, in conjunction with Law No. 243/1992 in respect of property taken whether before or after 25 February 1948, if they can demonstrate their loyalty to the Czech Republic and their innocence of any wrong-doing against the Czechoslovak State, whereas the author is denied this opportunity, because according to the post-1991 judgements, the expropriation under the Benes' Decrees was superseded by the enactment of Law No. 143/1947.

3.6 It is submitted that the author's denial of and exclusion from an effective remedy for the arbitrary, illegal, unfair and discriminatory taking of her property under the Benes' Decrees and under Law No. 143/1947, constitutes continuing, arbitrary, unfair and unconstitutional discriminatory treatment of the author by the public authorities of the Czech Republic - legislative, executive, and judicial - which is contrary to the obligations of the Czech Republic under articles 2 and 26 of the Covenant. In this connection, the author states that the Human Rights Committee's considerations in the Simunek[8] case are directly relevant to her complaint.

3.7 As regards her claim under article 14, paragraph 1, of the Covenant, the author states that she has been denied the right to equality before the Czech Courts and to a fair hearing by an independent and impartial tribunal, including effective access thereto. In this context, she refers to the manner in which the Courts rejected her claim, to more favourable jurisprudence of the Constitutional Court in comparable cases, and to the Constitutional Court's refusal to decide on the constitutionality of Law No. 143/1947.

3.8 In this context, the author points out that it was inherently contradictory to logic and common sense for the Constitutional Court to have confirmed the legal effects of Law No. 143/1947 while at the same time declaring the question of the constitutional validity of the Law to be irrelevant to the determination of the author's rights. The Court's decision was moreover inconsistent with its own jurisprudence and constitutional functions in annulling discriminatory legislation.

State party's observations

4.1 By submission of 4 December 1997, the State party argues that the communication is inadmissible *ratione temporis*, as manifestly ill-founded, and for failure to exhaust domestic remedies. In explaining the background of the restitution legislation, the State party emphasizes that it was designed to deal with the after-effects of the totalitarian communist regime and that it was logically limited by the date when the communists took power, and that it is an ex gratia act which never intended to provide for global reparation.

4.2 According to the State party, the communication is manifestly ill-founded since it is clear from the text of Law No. 143/1947 that the property in question devolved from Dr. Adolf Schwarzenberg to the State by virtue of this Act, before the qualifying date of 25 February 1948 contained in Law No. 229/1991. The State party explains that intabulation was only required for property changes by way of transfer (requiring the consent of the former owner) and not for property changes by way of devolution (not requiring the owner's consent).

In the latter cases intabulation is but a formality, serving to safeguard the ownership of the State against third persons. Also, Law No. 243/1992 does not apply to the author's case, since it is explicitly limited to expropriations carried out under the Benes' Decrees.

4.3 The State party argues that the Committee is incompetent *ratione temporis* to examine the author's claim that Law No. 143/1947 was unlawful or discriminatory. The State party acknowledges that the Committee would be competent *ratione temporis* to assess cases covered by either Law No. 229/1991 or 243/1992, including cases, which originated in the period preceding the date of entry into force of the Covenant for the Czech Republic. However, since neither Law applies to the author's case, the sphere of legal relations established by Law No. 143/1947 is *ratione temporis* outside the scope of the Covenant.

4.4 Finally, the State party argues that the communication to the Committee is wider in scope than the author's complaint to the Constitutional Court and is therefore inadmissible for non-exhaustion of domestic remedies. In this connection, the State party submits that 27 complaints presented by the author are still pending before the Constitutional Court.

Author's comments

5.1 In her comments to the State party's submission, the author does not challenge the State party's explanation that the legislation never intended to provide global reparation, but submits that the complaint in the present case concerns the way this legislation has been applied to the author's case, resulting in discriminatory denial and exclusion from an effective remedy of restitution or compensation for the unlawful taking of her family's property, in violation of her right to equality before the law and equal protection by the law. The complaint also concerns the denial of her right to equality before the Czech courts and of a fair hearing.

5.2 As regards the State party's argument that the communication is manifestly ill-founded, counsel refers to the legal regime for restitution and compensation, which consists of different laws and lacks transparency. The author contests the version of the facts presented by the State party and maintains that her family's property was taken unlawfully by the State under Benes' Decrees Nos. 12/1945 and 108/1945, and that Law No. 143/1947 did not take property away from the family. If, however, which the author denies, the Law No. 143/1947 did deprive the author's family of their property as suggested by the State party, then the author challenges the State party's statement that the property was taken before the qualifying date of 25 February 1948. In this context, the author refers to her earlier submissions and argues that the Courts have failed to recognize the arbitrary, unfair and unconstitutional nature of the provision of the qualifying date of 25 February 1948.

5.3 The author notes that the State party has not addressed the complaint that the Constitutional Court denied her a hearing concerning the constitutionality of Law No. 143/1947 by declaring her complaint inadmissible.

5.4 Concerning the State party's argument that the communication is inadmissible *ratione temporis*, the author points out that she does not complain that Law No. 143/1947 was in violation of the Covenant, but that the acts and omissions of the State party's public authorities after the entry into force of the Covenant and Optional Protocol, denying her an effective remedy of restitution and compensation in a discriminatory manner, violate the Covenant.

5.5 With regard to the State party's argument that her communication is wider in scope than her appeal to the Constitutional Court, and that several constitutional complaints are still pending before the Constitutional Court, she states that this is due to the failure of the courts to deal with the substance of her case, and the lack of cooperation by the authorities to investigate and to assist the author to clarify the matters at issue.

5.6 In a further submission, dated 12 January 1999, the author informs the Committee about developments in her case. She refers to decisions taken by the Constitutional Court on 4 September 1998, in which the Court decided that her claims for restitution under Law No. 243/1992 were outside the time limit prescribed for claims under that Law. She explains that the time limit for filing complaints was 31 December 1992, and for entitled persons who as of 29 May 1992 were not residing in the Czech Republic, 15 July 1996. The author, having become a Czech citizen and resident in 1993, made her claim on 10 July 1996. The Court, however, rejected her claim since she had not been a citizen on 29 May 1992, and therefore was not an entitled person as defined by the law.

5.7 The author claims that the requirement of Czech citizenship constitutes a violation of her rights under articles 2 and 26 of the Covenant. In this context, she refers to the Committee's Views in *Simunek* (Case No. 516/1992).

5.8 Counsel further submits that, in a decision of 26 May 1998, the Constitutional Court, concerning the Salm palace in Prague, decided that the author's restitution claim was inadmissible for being out of time and that it therefore need not decide whether or not the author had a title to the property. According to the author, in refusing to decide her title claim, the Court denied her justice in violation of article 14, paragraph 1, of the Covenant.

Admissibility considerations

6.1 At its sixty-sixth session in July 1999, the Committee considered the admissibility of the communication.

6.2 It held that the author's claims concerning Law No. 143/1947 were outside the Committee's competence *ratione temporis* and thus inadmissible under article 1 of the Optional Protocol.

6.3 With regard to the author's claim that she was denied a fair hearing because of the manner in which the courts interpreted the laws to be applied to her case, the Committee recalled that the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned and declared this part of the communication inadmissible under article 3 of the Optional Protocol.

6.4 The Committee also considered inadmissible the author's claim that she is a victim of a violation of article 14, paragraph 1, of the Covenant, because the courts refused to determine whether she had a legal title to property. The Committee found that the author had not substantiated her claim, for purposes of admissibility, that the failure of the courts in this respect was arbitrary, or that the Government's failure to examine the constitutionality of Law No. 143/1947 constituted a violation of article 14 (1).

6.5 With regard to the State party's objection that the communication was inadmissible for non-exhaustion of domestic remedies, the Committee noted that all the issues raised in the present communication have been brought before the domestic courts of the State party in the several applications filed by the author, and have been considered by the State party's highest judicial authority. The Committee considered therefore that it was not precluded from considering the communication by the requirement contained in article 5, paragraph 2 (b), of the Optional Protocol.

6.6 The Committee noted that a similar claim filed by the author had been declared inadmissible by the European Commission of Human Rights on 11 April 1996. However, article 5, paragraph 2 (a), of the Optional Protocol would not constitute an obstacle to the admissibility of the instant communication, since the matter was no longer pending before another procedure of international investigation or settlement, and the Czech Republic had not made a reservation under article 5 (2) (a) of the Optional Protocol.

6.7 On 9 July 1999, the Committee decided that the author's remaining claims, that she has been excluded from access to a remedy in a discriminatory manner, are admissible as they may raise issues under articles 2 and 26 of the Covenant.

The State party's and author's submissions on the merits

7.1 By submission of 23 March 2002, the author refers to the Committee's Views in Case No. 774/1997 (*Brok v. The Czech Republic*), and, with respect to the issue of equal access, within the limits of the admissibility granted for issues under articles 2 and 26 of the Covenant, alleges that the Ministry of Agriculture and various State archives, until the year 2001, consistently denied to the author and to all land authorities access to the complete file on the confiscation procedures against her grandfather Dr. Adolph Schwarzenberg and his appeals lodged in due course (see paragraph 5.5 above). In particular, it is stated that as late as 2001 author's counsel was denied the inspection of the Schwarzenberg file by the director for legal affairs in the Ministry, Dr. Jindrich Urfus, and only when the author had found other relevant documents in another archive, was counsel informed by the Ministry, on 11 May 2001, that the file indeed existed and he was allowed to inspect it. Moreover, it is stated that on 5 October 1993 the head of the State archive in Krumlov, Dr. Anna Kubikova, had denied the author the use of the archive in the presence of her assistant Ing. Zaloha, dismissing her with the words "All Czech citizens are entitled to use this archive but you are not entitled to do so." The author complains that such denials of access illustrate the inequality of treatment to which she has been subjected by the Czech authorities since 1992.

7.2 The documents suppressed prove that, in fact, the Schwarzenberg estate was confiscated pursuant to Presidential Decree No. 12/45. The authorities of the State party not only prevented the author from detecting and reporting the complete facts of her case to the land authorities and courts and to meet the deadlines for lodging claims according to laws 87/91 and 243/92, but also wilfully misled all land authorities and the Human Rights Committee.

7.3 On 29 November 2001, the Regional Court of Ceske Budejovice (15 Co 633/2001-115) as court of appeal confirmed that the Schwarzenberg estate was indeed confiscated pursuant to section 1, par. 1, lit (a) of Decree No. 12/45, thus underlining the inapplicability of Law 143/47. However, the Court granted no redress to the author, because according to the author, there was no remedy available for anybody deemed to be of German or Hungarian stock.

7.4 The Ministry of Lands also rejected the author's appeals against the refusal by all land authorities to reopen various restitution procedures in the light of the crucial information that had been suppressed and which the author had finally been able to obtain. It is assumed that the uniform negative decrees from various land authorities were issued on instruction from the Ministry itself, as the Ministry has instructed the land authorities on other procedures concerning the author.

7.5 It is further stated that the Prague City Court ignored the relevant findings of the Czech Constitutional Court in not applying the restitution Law No. 243/92. It is alleged that this denial of justice constitutes unequal treatment because of the author's language, national and social origin and property.

8.1 By note verbale of 7 June 2002 the State party made the following observations on the merits. With regard to the author's challenge to the interpretation of Act No. 143/1947 by the Czech courts, the State party submits that "the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned. It is not within the powers of the Committee to evaluate whether the competent authorities of the State party in question have interpreted and applied the domestic law correctly in the present case, unless it is established that they have not interpreted and applied it in good faith or it is evident that there has been an abuse of power. The proceedings of the courts of the Czech Republic in the case in question are described in detail in the Observation of the Czech Republic on the admissibility of the communication, which confirms the legality of the court proceedings. On the other hand, the author did not substantiate the allegation of the perverse interpretation of Act No. 143/1947".

8.2 With regard to the author's claim of discrimination between the interpretations of Act No. 142/1947 and Act No. 143/1947, the State party refers to its observation on the admissibility of the communication which contains the quotation of the relevant provisions of Act No. 143/1947 and explanation of their interpretation by administrative and judicial authorities of the Czech Republic.

8.3 With regard to the author's challenge of the choice of the qualifying date of 25 February 1948 as arbitrary, the State party observes that "the question of compliance of the qualifying date of 25 February 1948 in the restitution law of the Czech Republic with articles 2 and 26 of the Covenant were repeatedly considered by the Committee. In connection to this, the Czech Republic refers to the decisions of the Committee in cases *Ruediger Schlosser v. The Czech Republic* (communication No. 670/1995) and *Gerhard Malik v. The Czech Republic* (communication No. 669/1995). In both of these cases, the Committee concluded that 'not every distinction or differentiation in treatment amounts to discrimination within the meaning of articles 2 and 26. The Committee considers that in the present case, legislation adopted after the fall of the Communist regime does not appear to be prima facie discriminatory within the meaning of article 26 merely because, as the author contends, it does not compensate the victims of injustices committed in the period before the Communist regime ...' The purpose of the restitution legislation was to redress the property injustices caused by the Communist regime in the period 1948-1989. The stipulation of the qualifying date by the legislator was objective due to the fact that the Communist coup took place on 25 February 1948 and justified with regard to the economic possibilities of the State in transition from totalitarian to democratic regime. The non-existence of the recognition of the right to restitution in international law should be also taken into account in this respect."

8.4 With respect to the author's challenge of the distinction for the restitution of the property between Act No. 142/1947 and Act No. 143/1947 and the arbitrary and unfair discrimination between the author and other victims of confiscations of property under Presidential Decrees of 1945, the State party observes that "the restitution legislation is not related to transfer of the property carried out before 25 February 1948, in conformity with the laws implementing a new social and economic policy of the State. These laws were not instruments of Communist persecution. While Act No. 229/1991 refers to Act No. 142/1947 (art. 6, para. 1 (b)) it also stipulates that the transfer of the property had to be made in the qualifying period from 25 February 1948 till 1 January 1990. Through this cumulative condition Act No. 229/1991 observes the above-mentioned purpose and philosophy of the restitution legislation and represents the objective criteria for the entitlement to the restitution of property. The property of the grandfather of the author of the communication was transferred to the State before 25 February 1948 and therefore does not fall within the restitution of the property caused by the Communist regime. The restitution of property due to the injustices caused by the incorrect application of the Presidential Decrees is stipulated by Act No. 243/1992 and it relates to a totally different situation than that of the author's grandfather and therefore is irrelevant in this case."

9.1 In her comments of 24 June 2002, the author reiterates that the essence of the complaint is that the Czech authorities have violated her right to equal treatment by arbitrarily denying her right to restitution under Act No. 243/1992, which extended eligibility for restitution of property to a citizen of the Czech Republic (like the author) who is descended from someone (Dr. Adolph Schwarzenberg) who lost his property as a result of Presidential Decree No. 12/1945 or Presidential Decree No. 108/1945. Provided that the property was taken under either of the Benes' Decrees, there is no requirement under Czech law that it was taken within the qualifying period prescribed by Act No. 87/1991 and Act No. 229/1991, beginning on 25 February 1948.

9.2 It is stated that the Czech authorities have arbitrarily ignored the clear and unambiguous evidence produced by the author from the contemporary official records that the property was taken by the Czechoslovak State from Dr. Adolph Schwarzenberg under Decree No. 12/1945, and that they have denied her any remedy on the false basis that the property was taken under the so-called "Lex Schwarzenberg", Act No. 143/1947, rather than under Benes' Decree No. 12/1945. In their observations the Czech Government focuses only on justifying the "cut-off" date of 25 February 1948, provided for in restitution Acts Nos. 87/1991 and 229/1991. The State party fails to address the essence of the author's case, that the relevant property was taken pursuant to the Benes' Decrees, and that it is therefore entirely irrelevant that the taking occurred before 25 February 1948. The State party dismisses the author's reference to her right to restitution pursuant to Act No. 243/1992 in one sentence, merely stating that "it relates to a totally different situation than that of the author's grandfather and therefore is irrelevant in this case". No evidence or reasoning is provided to substantiate this bare assertion, which is contradicted by the decision of the Regional Court in Ceske Budejovice, sitting as an appellate court, dated 29 November 2001. That decision found that Dr. Adolph Schwarzenberg's property was transferred into the ownership of the State pursuant to Decree No. 12/1945. The court stated that it "has no doubts that the property of Adolph Schwarzenberg was transferred into the ownership of the State with immediate effect in full accordance with Decree No. 12/45". Not only does the State party in its Observations ignore the Regional Court's finding, but it also fails to address the other facts and arguments brought to the attention of the Committee by the author in its submission of 23 March 2002 (see above paragraphs 7.1-7.5).

9.3 The author refers to the evidence placed before the Committee showing that the Czech authorities have until 2001 systematically denied her access to the documents that proved that the confiscations had taken place pursuant to Benes' Decree No. 12/1945. By suppressing this evidence, the authorities wrongly prevented the author from detecting and reporting the true facts of her case to the land authorities and courts.

9.4 Moreover, the author argues that for the purposes of this case, the Committee's obiter dicta in its decisions concerning the admissibility of cases Schlosser and Malik against the Czech Republic, on which the State party relies, are irrelevant. The author accepts that not every distinction in treatment amounts to discrimination, but the facts of her case are entirely different from the circumstances of the Schlosser and Malik cases. The author's case concerns the arbitrary denial of access to information crucial to exercising her rights to restitution, and the arbitrary denial of a remedy pursuant to Act 243/1992, which was enacted to redress injustices in the application of the Benes' Decrees, such as were endured by Dr. Adolph Schwarzenberg.

10. The author's submission was transmitted to the State party on 24 June 2002. No further comments have been received.

The examination of the merits

11.1 In conformity with article 5, paragraph 1, of the Optional Protocol, the Committee proceeds to an examination of the merits on the basis of all the information submitted by the parties.

11.2 The question before the Committee is whether the author was excluded from access to an effective remedy in a discriminatory manner. According to article 26 of the Covenant, all persons are equal before the law and every person has the right to equal protection of the law.

11.3 The Committee notes the statement of the author that the essence of her complaint is that the Czech authorities have violated her right to equal treatment by arbitrarily denying her right to restitution on the basis of Laws Nos. 229/1991 and 243/1992 with the argument that the properties of her adoptive grandfather were confiscated under Law No. 143/1947 and not under Benes' Decrees Nos. 12 and 108/1945 and therefore the restitution laws of 1991 and 1992 would not apply. The Committee notes further the author's argument that the State party constantly, until the year 2001, denied her access to the relevant files and archives, so that only then could documents be presented that would prove that, in fact, the confiscation occurred on the basis of the Benes' Decrees of 1945 and not of Law No. 143/1947, with the consequence that the author would be entitled to restitution under the laws of 1991 and 1992.

11.4 The Committee recalls its jurisprudence that the interpretation and application of domestic law is essentially a matter for the courts and authorities of the State party concerned. However, in pursuing a claim under domestic law, the individual must have equal access to remedies, which includes the opportunity to ascertain and present the true facts, without which the courts would be misled. The Committee notes that the State party has not addressed the allegation of the author that she was denied access to documents which were crucial for the correct decision of her case. In the absence of any explanation by the State party, due weight must be given to the author's allegations.

11.5 In this context, the Committee also notes that by decision of 29 November 2001, the Regional Court of Ceske Budejovice recognized that the taking of Dr. Adolph Schwarzenberg's property had been effected pursuant to Benes' Decree 12/1945. The Committee further notes that on 30 January 1948 the confiscation of the Schwarzenberg agricultural lands under Benes'

Decrees Nos. 12 and 108/1945 was revoked, apparently in order to give way for the application of Law 143/1947. The point in time when the revocation became effective seems not to have been clarified, because the courts proceeded from the premise that Law No. 143 was the only applicable legal basis.

11.6 It is not the task of the Committee but of the courts of the State party to decide on questions of Czech Law. The Committee finds, however, that the author was repeatedly discriminated against in being denied access to relevant documents which could have proved her restitution claims. The Committee is, therefore, of the view that the author's rights under article 26 in conjunction with article 2 of the Covenant were violated.

12.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it reveal a violation of article 26, in conjunction with article 2 of the Covenant.

12.2 In accordance with article 2, paragraph 3 (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including an opportunity to file a new claim for restitution or compensation. The State party should review its legislation and administrative practices to ensure that all persons enjoy both equality before the law as well as the equal protection of the law.

12.3 The Committee recalls that the Czech Republic, by becoming a State party to the Optional Protocol, recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. Furthermore, the Committee urges the State party to put in place procedures to deal with Views under the Optional Protocol.

12.4 In this connection the Committee wishes to receive from the State party, within 90 days following the transmittal of these Views to the State party, information about the measures taken to give effect to the Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the new Czech Republic notified its succession to the Covenant and the Optional Protocol.

[2] The law reads:

> "1 (1) The ownership of the property of the so-called primogeniture branch of the Schwarzenberg family in Hluboká nad Vlatavou - as far as it is situated in the Czechoslovak Republic - is transferred by law to the county of Bohemia ...

> "4 The annexation of the property rights as well as all other rights according to paragraph 1 in favour of the county of Bohemia will be dealt with by the courts and offices, which keep public records of immobile property or other rights, and that following an application by the National Committee in Prague.
>
> "5 (1) The property is transferred into the ownership of the county of Bohemia without compensation for the former owners …"

[3] Act No. 229/1991 enacted by the Federal Assembly of the Czech and Slovak Federal Republic came into force on 24 June 1991. The purpose of this law was "to alleviate the consequences of some property injuries suffered by the owners of agrarian and forest property in the period from 1948 to 1989". According to the Act persons who are citizens of the Czech and Slovak Federal Republic who reside permanently on its territory and whose land and buildings and structures belonging to their original farmstead devolved to the State or other legal entities between 25 February 1948 and 1 January 1990 are entitled to restitution of this former property inter alia if it devolved to the State by dispossession without compensation under Law No. 142/1947, and in general by expropriation without compensation. By judgement of 13 December 1995 the Constitutional Court - held that the requirement of permanent residence in Act No. 229/1991 was unconstitutional.

[4] Concerning the "Stekl" property.

[5] Concerning properties in Krumlov and Klatovy.

[6] The Prague City Court decided that the author was not an "entitled person" under section 4 (1) of Act No. 229/1991 on the ground that the transfer of the Schwarzenberg property to Czechoslovakia occurred immediately upon the promulgation of Act No. 143/1947 on 13 August 1947, before the qualifying date of 25 February 1948 prescribed by section 4 (1) of Act No. 229/1991. However, before the judgement by the Prague City Court, the interpretation had been that the material date was the date of intabulation of the property, which in the instant case occurred after 25 February 1948. In this context, the author states that the Constitutional Court, by judgement of 14 June 1995, concerning Act No. 142/1947 recognized that until 1 January 1951 intabulation had been necessary for the transfer of property.

[7] Law No. 243/1992 provides for restitution of property which was expropriated under Benes' Decrees Nos. 12/1945 and 108/1945, provided that the claimant is a Czech citizen and did not commit an offence against the Czechoslovak State.

[8] *Simunek et al. v. Czech Republic*, Case No. 516/1992. Views adopted on 17 July 1995.

APPENDIX

Partly concurring individual opinion by Committee member Mr. Nisuke Ando

As for my own view on the restitution laws enacted after 1991, reference is made to my individual opinion appended to the Committee's Views in communication No. 774/1997: *Brok v. The Czech Republic*.

As for the Committee's Views in the instant case, I must *first* point out that the Views contradicts the Committee's own admissibility decision. In its admissibility decision of 9 July 1999, the Committee clearly held that the author's claims concerning Law No. 143/1947 were outside the Committee's competence *ratione temporis* and thus inadmissible under article 1 of the Optional Protocol (6.2). And yet, in its examination of the merits, the Committee goes into the details of the author's claims and states that on 30 January 1948 the confiscation of the properties in question under Benes' Decrees Nos. 12 and 108/1945 were revoked in order to give way for the application of Law 143/1947 (11.5), that on 29 November 2001 the Regional Court of Ceske Budejovice recognized the confiscation as effected pursuant to Benes' Decree No. 12/1945 (11.5), that the author was denied access to the relevant documents which were crucial for the correct decision of her case (11.4), and that only those documents could prove that the confiscation occurred on the basis of the Benes' Decrees of 1945 and not of Law No. 143/1947 (11.3).

Secondly, I must point out that, in these statements as well as in its conclusion that the State party violated the author's right to the equal protection of the law under articles 26 and 2 by denying the author's access to the relevant documents (11.6), the Committee has deviated from its established jurisprudence that it should not act as the court of fourth instance to any domestic court. True, the Committee indicates that the interpretation and application of domestic law is essentially a matter for the courts and the authorities of the State party concerned (11.4 and 11.6). However, while the Czech courts have decided that the properties in question were transferred to the State before 25 February 1948 and thus do not fall within the restitution of the property caused by the Communist regime (8.4), the Committee concludes that the author was denied access to the relevant documents in violation of articles 26 and 2 of the Covenant (11.6) and that the State party is under an obligation to provide the author with an opportunity to file a new claim for restitution on the basis of the relevant documents (12.2).

Thirdly, I must point out that, on 11 May 2001, the author's counsel was not only informed by the Czech Ministry of Agriculture of the existence of the relevant documents but also was allowed to inspect them (7.1). From this date onward, in my opinion, it seems impossible to maintain that the State party continued to violate the author's rights under articles 26 and 2 by excluding her from access to the documents in question.

(*Signed*): Nisuke Ando

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Partly concurring individual opinion by Committee member Justice Prafullachandra Natwarlal Bhagwati

I agree with the Committee's conclusion that the facts before it reveal a violation of articles 26 and 2 of the Covenant. However, I am persuaded that there is also a violation of article 14, paragraph 1, of the Covenant, which stipulates that all persons shall be equal before the courts and tribunals and be entitled to a fair and public hearing of their rights and obligations in a suit at law. As a prerequisite to have a fair and meaningful hearing of a claim, a person should be afforded full and equal access to public sources of information, including land registries and archives, so as to obtain the elements necessary to establish a claim. The author has demonstrated that she was denied such equal access, and the State party has failed to explain or refute the author's allegations. Moreover, the protracted legal proceedings in this case, now lasting over 10 years, have not yet been completed. In the context of this particular case and in the light of previous Czech restitution cases already adjudicated by the Committee, the apparent reluctance of the Czech authorities and of the Czech courts to process restitution claims fairly and expeditiously also entails a violation of the spirit, if not the letter of article 14. It should also be remembered that, subsequent to the entry into force of the Optional Protocol for the Czech Republic, the State party has continued to apply Law No. 143/1947 (the "law Schwarzenberg") which targeted exclusively the property of the author's family. Such ad hominem legislation is incompatible with the Covenant, as a general denial of the right to equality. In the light of the above, I believe that the appropriate remedy should have been restitution and not just the opportunity of resubmitting a claim to the Czech courts.

In 1999 the Committee had declared this communication admissible, insofar as it might raise issues under articles 26 and 2 of the Covenant. I do not think that this necessarily precluded the Committee from making a finding of a violation of article 14, since the State party was aware of all elements of the communication and could have addressed the article 14 issues raised by the author. Of course, the Committee could have revised its admissibility decision so as to include the claims under article 14 of the Covenant, and requested relevant observations from the State party. This, however, would have further delayed disposition of a case which has been before the Courts of the State party since 1992 and before the Committee since 1997.

(*Signed*): Prafullachandra Natwarlal Bhagwati

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

C. Communication No. 778/1997, *Coronel et al. v. Colombia**
(Views adopted on 25 October 2002, seventy-sixth session)

Submitted by:	José Antonio Coronel et al. (represented by counsel, Mr. Federico Andreu Guzmán)
Alleged victims:	Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero, Luis Honorio Quintero Ropero, Ramón Villegas Tellez and Ernesto Ascanio Ascanio
State party:	Colombia
Date of communication:	29 September 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 October 2002,

Having concluded its examination of communication No. 778/1997, submitted to the Human Rights Committee by Mr. José Antonio Coronel et al. on behalf of his seven relatives Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero, Luis Honorio Quintero Ropero, Ramón Villegas Tellez and Ernesto Ascanio Ascanio under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The six authors of the communication are José Antonio Coronel, José de la Cruz Sánchez, Lucenid Villegas, José del Carmen Sánchez, Jesus Aurelio Quintero and Nidia Linores Ascanio Ascanio, acting on behalf of seven deceased family members: Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero, Luis Honorio Quintero Ropero, Ramón Villegas Tellez and Ernesto Ascanio Ascanio, all Colombian nationals who died in January 1993.[1] The authors of

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèle Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

the communication claim that their relatives were victims of violations by Colombia of article 2, paragraph 3, article 6, paragraph 1, and articles 7, 9 and 17 of the International Covenant on Civil and Political Rights. The authors are represented by counsel.

The facts as submitted by the authors

2.1 Between 12 and 14 January 1993, troops of the "Motilones" Anti-Guerrilla Batallion (No. 17), attached to the Second Mobile Brigade of the Colombian National Army, conducted a military operation in the indigenous community of San José del Tarra (municipality of Hacari, department of Norte Santander) and launched a search operation in the region, making incursions into a number of neighbouring settlements and villages. During these operations, the soldiers raided several houses and arrested a number of people, including Ramón Villegas Téllez, Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero and Luis Honorio Quintero Ropero. Both the raids and the arrests were carried out illegally, since the soldiers did not have the judicial warrants prescribed by Colombian law on criminal procedure to conduct searches or make arrests.

2.2 Ramón Villegas Téllez, Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero, Luis Honorio Quintero Ropero and others were tortured by the soldiers, and some of them were forced to put on military uniforms and go on patrol with the members of the "Motilones" Anti-Guerrilla Battalion (No. 17). All of them were "disappeared" between 13 and 14 January 1993.

2.3 On 26 January 1993, Luis Ernesto Ascanio Ascanio, aged 16, disappeared while on his way home, abducted by soldiers who, a few days before, had raided the home of the Ascanio Ascanio family, ill-treating and harassing the family members, who included six minors and also a 22-year-old mentally deficient young man, whom they attempted to hang. The soldiers remained in the house until 31 January, holding its inhabitants hostage. Luis Ernesto Ascanio Ascanio was seen for the last time some 15 minutes away from the family home. On the same day, members of the Ascanio family heard shouts and shots coming from outside the house. On 27 January, two of the brothers of Luis Ernesto Ascanio Ascanio succeeded in evading the military guards and fled to Ocaña, where they advised the local authorities and submitted a complaint to the Provincial Office of the Attorney-General. Once the military patrol had withdrawn, the search for Luis Ernesto Ascanio Ascanio began; the outcome was the discovery of a pocket knife belonging to him some 300 metres away from the house.

2.4 The Second Mobile Brigade reported various alleged armed clashes with guerrillas of the Revolutionary Armed Forces of Colombia (FARC) - the first on 13 January 1993, the second on 18 January 1993 and two incidents on 27 January 1993. The version given by the military authorities was that during the clashes the regular troops had killed a number of guerrillas. On 13 January 1993, three bodies were removed by the judicial police (SIJIN) in Ocaña, one of which was identified as the body of Gustavo Coronel Navarro. On 18 January, the soldiers deposited at the hospital the bodies of four alleged guerrillas "killed in combat". The SIJIN removed these corpses and confirmed the deaths of Luis Honorio Quintero Ropero, Ramón Emilio Quintero Ropero, Nahún Elías Sánchez Vega and Ramón Emilio Sánchez. On 29 January 1993, the Second Mobile Brigade brought in the bodies of four persons killed in the alleged clashes of 27 January 1993; again the SIJIN removed the bodies. On 21 May 1993, the bodies of the last four dead were exhumed in the cemetery of Ocaña; one of these was the body of Luis Ernesto Ascanio Ascanio, which was recognized by his relatives. The forensic report stated that one of the bodies brought to the hospital on 18 January contained a number of bullet entry holes with powder burns. In the records relating to the removal of the bodies on 21 May 1993, SIJIN officials stated that the bodies were clothed in uniforms used exclusively by the National Police.

2.5 The members of the victims' families and the non-governmental organizations (NGOs) assisting them have brought the facts to the attention of the judicial authorities in the criminal, administrative litigation, disciplinary and administrative departments at the local, provincial and national levels. Between 15 January and 1 February 1993, the relatives reported the disappearance of their family members to the Ocaña Provincial Office of the Attorney-General. They also lodged a complaint with the same authority concerning abuse of power by the Second Mobile Brigade and made various representations to the Ocaña Provincial Procurator's Office, the National Office for Examination and Processing of Complaints (Office of the Ombudsman) and the Regional Office of the Public Prosecutor in Cúcuta. The mayor of Hacari sent an official letter to the commander of the brigade requesting him to investigate the facts and order the release of the peasants. The mayor of the municipality of La Playa lodged complaints with the competent authorities concerning the incidents perpetrated by the Second Mobile Brigade within his municipality: namely acts of violence against the Ascanio Ascanio family and the disappearance of Luis Ernesto Ascanio Ascanio. After reporting the incidents, the Ascanio, Sánchez and Quintero families were subjected to a great deal of harassment; as a consequence, they had to leave the region and move to various places within the country.

2.6 On 15 July 1993, the municipal official in Hacari in charge of the case, after receiving information from the relatives, submitted a report in which he concluded that it was impossible to "identify individually" those responsible for the abduction of Gustavo Coronel Navarro and Ramón Villegas Téllez, but that they were members of the Second Mobile Brigade.

2.7 Only the family of Luis Ernesto Ascanio Ascanio submitted their complaint in person to the Ocaña Public Prosecutor's Office in February 1993. The facts relating to the other victims were brought to the attention of the Public Prosecutor's Office by one of the NGOs, since the other families were afraid to present themselves personally at the offices of the judiciary in Ocaña. The preliminary inquiries made were compiled in file No. 4239 and transmitted to the military jurisdiction, as the competent body, in April 1995. From 30 August 1995 onwards, the relatives attempted several times to convince the Human Rights Unit in the National Public Prosecutor's Office to begin criminal proceedings; but the request was turned down on the grounds that the matter was one for the military courts.

2.8 The military criminal jurisdiction undertook various preliminary investigations into the facts as described. Judge No. 47 of the Military Criminal Investigation Unit, attached to the Second Mobile Brigade, opened preliminary inquiries Nos. 27, 30 and 28,[2] the findings of which are contained in file No. 979, throughout which the incidents are referred to as "deaths in combat".

2.9 On 3 July 1996, the Second Mobile Brigade was stationed in the city of Fusagasuga (Cundinamarca), and the family of Luis Ernesto Ascanio Ascanio succeeded in submitting a petition to become a party to the proceedings. Up to the date of the initial communication, they had not been notified of any judicial decision on the subject.[3]

2.10 The authors state that the Special Investigations Unit in the National Office of the Attorney-General opened a file (No. 2291-93/DH) on the incidents in question following complaints submitted by the relatives to the Provincial Office of the Attorney-General in Ocaña, and officials were appointed to conduct the investigation. On 22 February 1993, a preliminary report from the officials in charge of the investigation drew attention to contradictions between the versions of the relatives and those of the military, and also to the way in which the judge in charge of Court No. 47 in the Military Criminal Investigation Department had hampered and obstructed them in their task. They suggested that further evidence should be sought and that disciplinary investigation proceedings should be instituted against Judge No. 47 of the Military Criminal Investigation Department.

2.11 The director of the Special Investigations Unit ordered a new investigation, including an investigation into the conduct of Judge No. 47 of the Military Criminal Investigation Department. The investigating officials submitted several reports to the director; one of them, relating to Luis Honorio Quintero Ropero, Ramón Emilio Ropero Quintero, Nahún Elías Sánchez Vegas and Ramón Emilio Sánchez, stated that "it is fully demonstrated that material responsibility lies with anti-guerrilla section C of battalion 17 ('Motilones') of the Second Mobile Brigade under the command of Captain Serna Arbelaez Mauricio".

2.12 On 29 June 1994, in their final report, the officials confirmed that it was fully proved that the peasants had been detained by members of anti-guerrilla battalion No. 17 ("Motilones") of the Second Mobile Brigade, on the occasion of a military operation carried out in compliance with operation order No. 10 issued by the commander of that military unit; that the peasants were last seen alive when in the hands of the soldiers and appeared to have died later in the course of two alleged clashes with units of the military. They also established that Luis Ernesto Ascanio Ascanio, a minor, was last seen alive heading home some 15 minutes' walk from home and that the boy was found dead after another alleged clash with the military. The officials identified the commanders, officers, non-commissioned officers and privates who formed part of the patrols that captured the peasants and occupied the dwelling of the Ascanio family. The report concluded that, "on the basis of the evidence advanced, the allegation of combats in which the victims could have taken part is discredited, since they were already being held by troops of the National Army, in a manner which was, moreover, irregular; some of them bear marks on the skin that demonstrate even more clearly the defenceless condition they were in ...". The report recommended that the case should be referred to the Armed Forces Division in the Procurator's Office.

2.13 On 25 October 1994, the Armed Forces Division in the Attorney-General's Office referred the file to the Human Rights Division of the same office on jurisdictional grounds. The transmission document indicates that "the following has been established ... the state of complete defencelessness of the victims ..., the close range at which the bullets that killed them were fired and the fact that they had been detained before they died; the foregoing, together with other evidence, disproves the existence of an alleged combat that allegedly was the central circumstance causing the deaths recorded".

2.14 On 28 November 1994, the Human Rights Division opened disciplinary proceedings file No. 008-153713 and began preliminary investigations. On 26 April 1996, it informed one of the NGOs that the proceedings were still at the preliminary inquiry stage.

2.15 On 13 January 1995, the families of the victims lodged a claim against Colombia in the administrative court for the deaths of Luis Honorio Quintero Ropero, Ramón Emilio Quintero Ropero, Ramón Emilio Sánchez, Luis Ernesto Ascanio Ascanio, Nahún Elías Sánchez Vega and Ramón Villegas Téllez; the claims were declared admissible between 31 January and 24 February 1995.

The complaint

3.1 The authors submit that the facts outlined above amount to violations by Colombia of article 6, paragraph 1, of the International Covenant on Civil and Political Rights in that the seven victims were arbitrarily deprived of life.

3.2 They also allege a violation of article 7 of the Covenant on account of the torture suffered by the victims after having been arbitrarily detained and before being murdered.

3.3 The authors maintain that the detention of the victims by the armed forces without any type of arrest warrant constitutes a violation of article 9 of the Covenant.

3.4 The authors also allege a violation of article 17 of the Covenant, inasmuch as the victims' right to privacy and freedom from interference in family life were violated when they were arrested in their homes.

3.5 The authors allege a violation of article 2, paragraph 3, of the Covenant since the State party has not provided an effective remedy for cases where it fails in its obligation to safeguard the rights protected by the Covenant.

3.6 The authors submit that, in view of the nature of the rights infringed and the gravity of the incidents, only remedies of a judicial nature can be considered effective; that is not the case with disciplinary remedies, according to the Committee's case law.[4] The authors also consider that the military courts cannot be considered as offering an effective remedy within the meaning of article 2, paragraph 3, since in military justice the persons implicated are both judge and party. It is indeed an incongruous situation, since the judge of first instance in criminal military cases is the commander of the Second Mobile Brigade, who is precisely the person responsible for the military operation that gave rise to the incidents forming the subject of the complaint.

The State party's observations on admissibility

4.1 In its communications dated 11 February and 9 June 1998, the State party requests that the complaint be declared inadmissible on the grounds that domestic judicial remedies have not been exhausted, as required under article 5, paragraph 2 (b), of the Optional Protocol to the International Covenant on Civil and Political Rights.

4.2 The State party maintains that the introduction of proceedings and the presentation of complaints before the investigating, supervisory and judicial authorities of the State, mentioned in the authors' communication with regard to the exhaustion of domestic remedies, form a basis for initiating the appropriate procedures but do not in themselves signify the exhaustion of those remedies.

4.3 The State party also reports that various proceedings are under way, from which it may be concluded that domestic judicial remedies have not been exhausted. The proceedings mentioned as under way are as follows:

- As regards criminal proceedings, investigation proceedings are being conducted by Court No. 47 of the Military Criminal Investigation Department. Progress is being made in one of the most important stages, namely that of investigation, in the course of which various steps have been taken, such as statements, identification of photographs, exhumations and special visits to the place where the incidents occurred and other neighbouring sites;

- In the light of Constitutional Court decision No. C-358, the Government has requested the Attorney-General's Office to study the possibility of transferring the criminal proceedings to the ordinary courts;

- As regards disciplinary proceedings, the Human Rights Division of the Attorney-General's Office has opened disciplinary proceeding file No. 008-153713 with a view to conducting a disciplinary inquiry concerning the members of the armed forces alleged to have been implicated;

- As regards administrative litigation, proceedings have been initiated (see paragraph 2.15) to obtain direct compensation and are at present under consideration in the administrative litigation courts, with a view to obtaining State compensation for damage that the State may have caused to an individual while performing its functions through one of its agents; this could lead to a declaration of institutional liability of the State in relation to the incidents forming the subject of the complaint.

4.4 According to the State party, the authors conclude that "the families and NGOs have applied to every possible source of legal remedy and have exhausted all the legal paths open to them", but they do not state in what way those sources are carrying out their functions. The authors themselves refer to "the great mass of information collected by the investigating authorities"; this confirms the Government's contention that the judiciary has been working on the case and is continuing to do so.

4.5 The Government does not share the authors' view that "the case has sunk in a morass of impunity". The remedies in themselves cannot be described as ineffective, nor can generalizations be made about their alleged ineffectiveness because of the difficulties faced both by the authorities and by the families of the victims in the exercise of those remedies. For instance, the sister of one of the victims submitted a petition to the National Directorate of Public Prosecutors' Offices requesting it to rule that a conflict of jurisdiction existed, so that the proceedings could be transferred from the military criminal justice system to the ordinary courts. This request could not be met and was refused, simply because she had applied to an administrative, and not a judicial, authority that was not competent to deal with petitions of that type. This clearly does not signify a denial of justice, and the difficulties and delays in the handling of the remedies cannot be interpreted as "impunity" on the part of the State.

The authors' comments on the State party's observations

5.1 In communications dated 30 March and 19 October 1998, the authors maintain that the mere existence of a procedural means of addressing human rights violations is insufficient; such remedies must have the capacity to protect the right violated or, failing that, to compensate the damage done. They note that the Human Rights Committee, when dealing with particularly serious violations, has held that only domestic remedies in criminal justice can be deemed to constitute effective remedies within the meaning of article 2, paragraph 3, of the Covenant.[5] They also note that, according to the Committee, purely administrative and disciplinary remedies cannot be deemed adequate or effective.

5.2 The authors maintain that the disciplinary procedure in question is a self-monitoring mechanism for the civil service, whose function is to ensure that the service is operating correctly.

5.3 According to the authors, administrative litigation deals with only one aspect of the right to compensation: the damage done and the loss of income suffered by the victim as a result of abuse of authority by an agent of the State or an error on the part of the civil service. Other aspects of the right of victims of human rights violations to compensation, such as the right to protection of family members,[6] are not covered by the decisions of administrative courts or the Council of State. From this standpoint, administrative litigation does not fully guarantee the right to compensation.

5.4 As regards the State party's contention that the Government has requested the Attorney-General's Office to consider the possibility of transferring the criminal proceedings to the ordinary courts in the light of Constitutional Court decision No. C-358, the authors make the following observations:

- Transfer of the criminal proceedings currently being conducted by the military authorities to the ordinary courts is not a certainty, but merely a possibility. In similar situations, the military courts have refused to comply with Constitutional Court decisions;

- Notwithstanding Constitutional Court decision No. 358/97, declaring a number of articles of the Code of Military Justice unconstitutional, the provisions of the Constitution governing military jurisdiction remain in force and their ambiguous wording makes it possible for violations of human rights by members of the armed forces to be prosecuted in the military courts;

- The Ascanio Ascanio family filed an appeal to have the case transferred to the ordinary courts in the light of Constitutional Court decision No. 358/97. Their appeal was turned down by the Office of the Public Prosecutor;

- It was in fact the Office of the Public Prosecutor that decided, without any legally valid grounds for doing so, to transfer the preliminary proceedings in the case to the military courts.

5.5 With regard to the State party's contention that the authorities to which the victims' relatives had turned have "carried out their functions", the authors state that this assertion is far from the truth, since the communications sent identify each of the State institutions to which an appeal was made and indicate the status of the proceedings in each.

5.6 The criminal proceedings have remained within the military criminal jurisdiction, yet the victims' families have been unable to become parties to the proceedings. On 27 February 1998, the Human Rights Division of the Attorney-General's Office ordered the discontinuance of the disciplinary investigation being conducted against some of those responsible for the incidents in the case. The decision by the Attorney-General's Office was based on the fact that one of the officers involved had died and that disciplinary action was being taken against the others under article 34 of Act No. 200 of 1995, which set a statute of limitations of five years for disciplinary matters.

5.7 Lastly, the authors reiterate that the only appropriate domestic remedy is criminal proceedings, which in the present case are being conducted in the military courts. In accordance with the Committee's case law and that of other international human rights bodies, the military courts in Colombia cannot be considered an effective remedy for dealing with human rights violations committed by members of the army. Even if a military criminal trial might be considered an appropriate remedy, the military criminal court has been conducting its criminal investigation for more than five years without any apparent results. The Colombian Military Criminal Code stipulates a period of no more than 30 days within which to complete the initial investigation (art. 552) and no more than 60 days for completion of the proceedings when there are two or more offences or defendants (art. 562). The trial, in one of the various procedural formats, must be conducted within two months (articles 652 to 681), by a summary court martial dealing with offences against life and the person (art. 683). The proceedings taking place in the military criminal court have exceeded these terms.

Decision on admissibility

6.1 At its seventieth session, the Committee considered the admissibility of the communication and ascertained, as required under article 5, paragraph 2 (a) of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.2 With regard to article 5, paragraph 2 (b), of the Optional Protocol, the Committee considered that the length of time taken in the judicial proceedings relating to the investigation of the deaths and prosecution of the perpetrators was unjustified. In addition, it recalled that, if the violation that is the subject of the complaint is particularly serious, as is the case with violations of basic human rights, particularly the right to life, remedies of a purely disciplinary and administrative nature cannot be considered sufficient or effective. Furthermore, the compensation proceedings have been unreasonably prolonged.

6.3 On 13 October 2000, the Committee declared the communication admissible, considering that the facts presented gave rise to issues under articles 6, 7, 9 and 17 of the Covenant in conjunction with article 2, paragraph 3.

The State party's observations on the merits

7.1 In its comments of 3 May and 20 September 2001, the State party restates its arguments concerning admissibility and repeats that domestic remedies have not been exhausted and that the situation cannot be described as a denial of justice.

7.2 According to the State party, the Public Prosecutor's Office has provided information to the effect that the Office of the Special Prosecutor to the Special Criminal Courts, Terrorist Unit 51-3, has begun an investigation into the deaths of Gustavo Coronel Navarro and others (Case No. 15,282). The results to date are as follows:

- On 19 February 1999, the Attorney-General's Office decided that the investigation should be conducted by the ordinary courts and ordered the immediate transfer of the case to said courts. On 18 September 2000, the National Directorate of Public Prosecutors' Offices ordered Case No. 15,282 to be assigned to the National Unit of Human Rights Prosecutors with a view to continuing proceedings. The National Unit of Human Rights Prosecutors returned Case No. 15,282 to the Public Prosecutors' Unit on the grounds that it fell outside its jurisdiction. Lastly, in a letter dated 15 February 2001, the Office of the Special Prosecutor announced that it had replied to the request for information submitted by the Association of Relatives of Detained and Disappeared Persons (ASFADDES);[7]

- On 22 March 2001, the Office of the Special Prosecutor ordered two of the accused, Captain Mauricio Serna Arbalaez and Francisco Chilito Walteros, to be given a free hearing, presided by Judge No. 47 of the Military Criminal Investigation Unit.

7.3 With regard to the merits of the case, the State party requests the Human Rights Committee to cease its consideration on the merits, since decisions are being taken in the domestic judicial system concerning the protection of the petitioners' rights.

7.4 The State party reiterates that the criminal investigation is currently in the preliminary inquiry stage and that at no time have the authorities closed or suspended the investigation. It cannot therefore be said that the State party has violated international law, since it has deployed all domestic judicial resources in order to obtain results.

7.5 Lastly, the State party maintains that there is a contradiction in the arguments submitted by the authors in the Committee's decision on admissibility.

Comments by the authors on the merits

8.1 In their comments of 13 July and 27 November 2001 on the State party's observations, the authors point out that the State party has given no response whatsoever concerning the merits of the communication. According to the authors, the State party has not denied that, of the seven victims, including a minor, six were illegally detained, tortured, disappeared and subsequently executed, or that another was disappeared, by members of anti-guerrilla battalion No. 17 ("Motilones"), attached to the Second Mobile Brigade of the Colombian National Army. Nor does the State party dispute that unlawful raids were carried out on the dwellings of the families of the murdered and disappeared victims or that several of the residents were illegally detained. Moreover, the State party says nothing about the murder of several members of the Ascanio family by alleged paramilitary forces or about the constant harassment of the family members and members of NGOs who reported the incidents.

8.2 According to the authors, the State party's comments demonstrate that the investigations have remained at a preliminary stage for eight years. In addition, the Office of the Criminal Procurator of the Attorney-General's Office requested on 19 February 1998 that the military criminal proceedings should be transferred to the ordinary courts. That request was received on 13 May 1998 by Judge No. 47 of the Military Criminal Investigation Unit, who ordered the preliminary proceedings to be transferred to the Ocaña Regional Attorney-General's Office. The criminal investigations into the incidents are currently being carried out by the Third Terrorism Sub-Unit of the Prosecutor's Office at the Criminal Court of the Attorney-General's Special Circuit.

8.3 The authors maintain that the decision to give Captain Mauricio Serna Arbelaez a free hearing makes no sense, since he died in August 1994, as mentioned in paragraph 5.6 above. The authors point out that it is strange that the other members of the military involved in the incidents not only have not been charged but were not even suspended from duty during the investigations and were even subsequently promoted.

8.4 With regard to the administrative litigation brought by the victims' families, the Santander Administrative Court rejected the claims for compensation on 29 September 2000.

8.5 Lastly, the authors reiterate that the fact that the State party has nothing to say about the incidents and violations referred to in the communication, or about the denial of effective remedy for such serious violations, can only be interpreted as an acceptance of the facts.

Issues and proceedings before the Committee

9.1 The Committee has considered the communication in the light of all the information provided by the parties in accordance with article 5, paragraph 1, of the Optional Protocol. The Committee notes that the State party continues to maintain that all domestic remedies have not been exhausted and that several procedures are still pending. The Committee considers that the application of domestic remedies has been unduly prolonged and that, consequently, the communication can be considered under article 5, paragraph 2 (b), of the Optional Protocol.

9.2 The Committee notes that the State party did not provide any more information concerning the facts of the case. In the absence of any reply from the State party, due consideration should be given to the authors' complaints to the extent that they are substantiated.

9.3 With regard to the authors' claim that there was a violation of article 6, paragraph 1, of the Covenant, the Committee notes that, according to the authors, the Special Investigations Unit of the Attorney-General's office established, in its final report of 29 June 1994, that State officials were responsible for the victims' detention and disappearance. Moreover, in its decision of 27 February 1998, which the Committee had before it, the Human Rights Division of the Attorney-General's Office acknowledged that State security forces had detained and killed the victims. Considering, furthermore, that the State party has not refuted these facts and that it has not taken the necessary measures against the persons responsible for the murder of the victims, the Committee concludes that the State did not respect or guarantee the right to life of Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero, Luis Honorio Quintero Ropero, Ramón Villegas Téllez and Luis Ernesto Ascanio Ascanio, in violation of article 6, paragraph 1, of the Covenant.

9.4 With regard to the claim under article 9 of the Covenant, the Committee takes note of the authors' allegations that the detentions were illegal in the absence of any arrest warrants. Bearing in mind that the State party has not denied this fact, and since, in the Committee's opinion, the complaint is sufficiently substantiated by the documents mentioned in paragraph 9.3, the Committee concludes that there has been a violation of article 9 of the Covenant in respect of the seven victims.

9.5 With regard to the authors' allegations of a violation of article 7 of the Covenant, the Committee notes that, in the decision of 27 February 1998 referred to in the preceding paragraphs, the Attorney-General's Office acknowledged that the victims Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Luis Ernesto Ascanio Ascanio and Luis Honorio Quintero Ropero had been subjected to treatment incompatible with article 7. Taking into account the circumstances of the disappearance of the four victims and that the State party has not denied that they were subjected to treatment incompatible with that article, the Committee concludes that the four victims were the object of a clear violation of article 7 of the Covenant.

9.6 However, with regard to the allegations concerning Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero and Ramón Villegas Téllez, the Committee considers that it does not have sufficient information to determine whether there has been a violation of article 7 of the Covenant.

9.7 With regard to the claim under article 17 of the Covenant, the Committee must determine whether the specific conditions in which the raid on the homes of the victims and their families took place constitute a violation of that article. The Committee takes note of the authors' allegations that both the raids and the detentions were carried out illegally, since the soldiers did not have search or arrest warrants. It also takes note of the corroborating testimony gathered from witnesses by the Attorney-General's Office showing that the procedures were carried out illegally in the private houses where the victims were staying. In addition, the Committee considers that the State party has not provided any explanation in this regard to justify the action described. Consequently, the Committee concludes that there has been a violation of article 17, paragraph 1, inasmuch as there was unlawful interference in the homes of the victims and their families or in the houses where the victims were present, including the home of the minor Luis Ernesto Ascanio Ascanio, even though he was not there at the time.

9.8 The Human Rights Committee, acting under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts that have been set forth constitute violations of article 6, paragraph 1; article 7 in respect of Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Luis Ernesto Ascanio Ascanio and Luis Honorio Quintero Ropero; article 9; and article 17 of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party has an obligation to provide the victims' relatives with effective remedy, including compensation. The Committee urges the State party to conclude without delay the investigations into the violation of

articles 6 and 7 and to speed up the criminal proceedings against the perpetrators in the ordinary criminal courts. The State party is also obliged to take steps to prevent similar violations from occurring in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the Committee's competence to determine whether or not there has been a violation of the Covenant and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 90 days, information on the measures it has taken to give effect to the Committee's decision. In addition, it requests the State party to publish the Committee's decision.

[Adopted in Spanish, French and English, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The authors' relationship with the victims is as follows: José Antonio Coronel, father of Gustavo Coronel Navarro; José de la Cruz Sánchez, father of Nahún Elías Sánchez Vega; Lucenid Villegas, sister of Ramón Villegas Tellez; José del Carmen Sánchez, father of Ramón Emilio Sánchez; Jesus Aurelio Quintero, father of Ramón Emilio and Luis Honorio Quintero Ropero; Nidia Linores Ascanio Ascanio, sister of Luis Ernesto Ascanio Ascanio.

[2] On 25 January, 2 February and 10 February 1993, respectively.

[3] Indeed, there is still no evidence that any judicial decision has been notified to them.

[4] See the Views adopted in cases Nos. 563/1993 (*Nydia Bautista de Arellana v. Colombia*), on 27 October 1995, paragraph 8.2, and 612/1995 (*Arhuacos v. Colombia*), 29 July 1997, paragraph 8.2.

[5] See note 4.

[6] CCPR/C/D/563/1993, para. 10.

[7] The written reply, a copy of which is in the possession of the Secretariat, explains that statements were taken during the preliminary investigation from all persons who were in any way familiar with the facts, and evidence was produced. It also states that consideration is currently being given to the question of which body is competent to deal with the case.

D. Communication No. 781/1997, *Aliev v. Ukraine*[*]
(Views adopted on 7 August 2003, seventy-eighth session)

Submitted by: Mr. Azer Garyverdy ogly Aliev

Alleged victim: The author

State party: Ukraine

Date of communication: 21 September 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 August 2003,

Having concluded its consideration of communication No. 781/1997, submitted by Mr. Azer Garyverdy ogly Aliev under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. Azer Garyverdy ogly Aliev, an Azerbaijani national, born on 30 August 1971. At the time of submission, the author was being held in the Donetsk remand centre (SIZO) in Ukraine, awaiting execution. He claims to be a victim of violations by Ukraine[1] of the International Covenant on Civil and Political Rights. Although the author does not invoke specific provisions of the Covenant, the communication appears to raise issues under articles 6, 7 and 10, article 14, paragraph 1, paragraph 3 (d), (e) and (g), and paragraph 5, and article 15 of the Covenant. He is not represented by counsel.

1.2 On 24 November 1997, in accordance with rule 86 of its rules of procedure, the Committee requested the State party to stay the execution of the author while his communication was under consideration. On 30 September 2002, the State party informed the Committee that, on 26 June 2000, the author's death sentence had been commuted to life imprisonment.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The facts as submitted by the author

2.1 On 8 June 1996, in the town of Makeevka, Ukraine, having consumed a large quantity of alcohol, the author, Mr. Kroutovertsev and Mr. Kot had an altercation in an apartment. The altercation degenerated into a fight. A fourth person, Mr. Goncharenko, witnessed the incident. According to the author, Mr Kot and Mr. Kroutovertsev beat him severely. Mr. Kroutovertsev also struck him with an empty bottle. While defending himself, the author seriously wounded Mr. Kot and Mr. Kroutovertsev with a knife, whereupon he fled.

2.2 The author states that he contacted Mr. Kroutovertsev's wife shortly afterwards in order to inform her of the incident and to ask her to call for assistance. On hearing this news, Mrs. Kroutovertseva began to hit him. The author states that he then slashed Mrs. Kroutovertseva's face with a knife and returned to his apartment, where his wife and some neighbours treated his wounds.

2.3 On 8 June 1996, the author reported the incident to a criminal investigation officer, Mr. Volkov, who ordered him to bring $15,000 to bribe the police and the prosecutors. The author collected only $5,600. The author gave official evidence in writing in Mr. Volkov's car. On hearing that one of the victims had died, the police officer told the author that, if he did not come up with the required sum by 2 p.m., he would be in trouble.

2.4 On the afternoon of 8 June 1996, the author and his wife left town and went into hiding in his mother-in-law's village, while his father tried to raise the sum of money that had been demanded. When they returned, they were arrested by the police on 27 August 1996 and taken to a police station, where they were interrogated for four days. According to the author, they were not given anything to eat during their detention. Mr. Volkov and other officers subjected the author to physical pressure, which included depriving him of oxygen by forcing him to wear a gas mask, in order to force him to confess to a number of unsolved crimes. The author's wife, who was pregnant at the time, was also beaten and a cellophane bag was placed over her head, which caused her to lose consciousness. In order to obtain his wife's release, the author signed all the documents that were placed before him, without reading them.

2.5 The police officers released his wife after having obtained her promise not to divulge what had taken place during the detention, failing which her husband would be killed and she would be reincarcerated. After her miscarriage, the author's wife decided to collect medical evidence in order to lodge a complaint, whereupon she was again threatened by Mr. Volkov and another officer. The author states that he complained to a procurator on 31 January 1997, but that the procurator had advised him to make his allegations during the trial.

2.6 The author was held for five months without access to a lawyer; he states that he was not examined either by a forensic psychiatrist, in spite of his medical history, or by a physician. During the reconstruction of the crime, the author was unable to participate, except when Mr. Kroutovertsev and Mr. Kot were also concerned.

2.7 The case was tried by the Donetsk regional court. According to the author, the court heard only witnesses produced by Mrs. Kroutovertseva, who were all her neighbours and friends.

2.8 The author states that, although the public prosecutor had demanded that the author be sentenced to 15 years' imprisonment, on 11 April 1997 the court found him guilty of the murder of Mr. Kroutovertsev and Mr. Kot and of the attempted murder of Mrs. Kroutovertseva, and sentenced him to death. On 28 April 1997, the author filed an appeal with the Supreme Court. He claims that his appeal was not transmitted by the Donetsk regional court and was illegally annulled. In this regard, the author notes that the public prosecutor had requested the annulment of the judgement and the transfer of the case for non-compliance with certain provisions of article 334 of the Code of Criminal Procedure.

The complaint

3.1 The author claims that he was sentenced to death without account being taken of the fact that, pursuant to articles 3 and 28 of the Constitution of Ukraine, capital punishment had been legally abolished, which rendered the sentence unconstitutional and inapplicable, contrary to the provisions of article 6 of the Covenant.

3.2 The author's allegations that he and his wife had been victims of torture and ill-treatment by the police for the purpose of extorting confessions during their detention, may violate article 14, paragraph 3 (g), article 7 and article 10, in combination with article 6 of the Covenant.

3.3 The author maintains that he was deprived of a fair trial for the following reasons. After his arrest, he was interrogated for four days by police officers at the police station where the chief was the brother of one of the deceased. He maintains that the charges against him were inconsistent, the presentation of the facts by the police and the public prosecutor was biased, and the court called only witnesses for the prosecution and the victims. The author states that, in examining his case record, he had discovered that the pages were not bound, numbered or attached, which made it possible to remove evidence in order to conceal illegal acts and procedural errors, and that his appeal to the Supreme Court had not been transmitted by the regional court. All this may constitute a violation of article 14, paragraph 1, paragraph 3 (e) and paragraph 5 of the Covenant.

3.4 The author claims that he did not have access to counsel during the five months following his arrest, from 27 August 1996 to 18 December 1996; on 17 July 1997, the Supreme Court took its decision in his absence and the absence of his counsel, in violation of article 14, paragraph 3 (d), of the Covenant.

3.5 According to the author, the Supreme Court confirmed an illegal decision, since the death sentence was incompatible with the Ukrainian Constitution of 1996. On 29 December 1999, the Constitutional Court had declared capital punishment unconstitutional; since that date, the penalty contained in article 93 of the Criminal Code was between 8 and 15 years' imprisonment. Rather than seeing his sentence modified and reduced "by a prompt review" of his conviction, the author was sentenced to life imprisonment, pursuant to the amendments to the Criminal Code of 22 February 2000. In his opinion, this constitutes a violation of his right to a lighter sentence because the penalty provided for under the "provisional law", following the decision of the Constitutional Court (of December 1999), was between 8 and 15 years' imprisonment while, following the reforms introduced in 2000, the author was imprisoned for life.

3.6 The author also claims that, in spite of his medical history, he was not examined by an expert psychiatrist, nor had the wounds that he had sustained during the events of 8 June 1996 been examined.

The State party's observations on admissibility and merits

4.1 In its notes verbales dated 26 May 1998 and 20 September 2002, the State party submitted its observations, claiming that the case did not entail any violation of the rights recognized under the Covenant, since the author had had a fair trial and had been sentenced in accordance with the law.

4.2 A criminal case for the murder of Mr. Kroutovertsev and Mr. Kot and the attack on Mrs. Kroutovertseva was opened on 9 June 1996 by the prosecution of the town of Makeevka. On 13 June 1996, a warrant for the arrest of Mr. Aliev and his wife was issued and those two persons were arrested on 28 August 1996. On 11 April 1997, the Donetsk regional court sentenced the author to death for intentional homicide with aggravating circumstances and for aggravated theft of personal effects. On 17 July 1997, the decision was confirmed by the Supreme Court. Pursuant to legislative amendments, on 26 June 2000 the Donetsk regional court commuted Mr. Aliev's death sentence to life imprisonment.

4.3 According to the State party, the court found the author guilty of having deliberately and vengefully murdered the victims with a knife during an altercation. The author later attempted to murder Mr. Kroutovertsev's wife out of greed, attacking and seriously wounding her, before stealing her jewellery. He returned to the scene of the crime the same day in order to remove a gold chain from Mr. Kroutovertsev's corpse.

4.4 The evidence concerning the crime was corroborated by the conclusions of the preliminary investigation and the forensic examination, and was confirmed by several witnesses, as well as by the inspection of the scene of the crime, physical evidence and the conclusions of experts.

4.5 The State party maintains that the courts correctly characterized the author's acts as constituting offences under the relevant articles of the Criminal Code. It considers that the author's allegations that he had wounded Mr. Kroutovertsev and Mr. Kot in self-defence were refuted by the procedural documents and the courts. In the light of the particular dangerousness of the crimes, the court was of the view that the author constituted an exceptional danger to society and imposed an exceptional sentence on him.

4.6 According to the State party, the author's allegation that he was subjected to unauthorized investigation methods was examined by the Supreme Court, which consider the allegation unsubstantiated. The State party affirms that the case record does not contain any element that would lead to the conclusion that illegal methods were used during the preliminary investigation; the author did not file any complaint with the Donetsk regional court in this regard. The court records do not contain any complaint by Mr. Aliev concerning the use of illegal methods of investigation or other unlawful acts by the investigators. It was only after the regional court took its decision that the author, in his application for judicial review, maintained that the investigators had forced his wife and him to make false statements. The State party points out that the application for judicial review submitted by the author's lawyer did not contain such allegations.

4.7 In conclusion, the State party notes that there is no reason to challenge the judicial decisions against the author and that the author did not file any complaint with the Procurator-General concerning the alleged unlawfulness of his sentence.

The author's comments

5.1 The author submitted his comments on the State party's observations on 21 April 2003. He reiterates his previous allegations and disputes the characterization of his acts by the prosecution and the courts. He maintains that, on the night of 7 to 8 June 1996, he wounded, but did not kill, Mr. Kot and Mr. Kroutovertsev. He challenges the witnesses' statements, which he claims were "attached to the case record by police officers" and used by the court.

5.2 The author reiterates that the investigation and the courts were biased against him because, at the time of the crime, the brother of one of the victims was the chief of the Makeevka district police station, while the sister of the other victim was the chief of the central police station's identity card department and she was, moreover, married to a judge. The author claims that, in order to aggravate his sentence, the police officers described a different sequence of events.

5.3 With regard to the allegations of ill-treatment of which he claims to be a victim, the author explains that part of his criminal file was covered with his blood. He reiterates that the investigators had put a gas mask over his head and had blocked the flow of air in order to force him to testify against himself. His wife was also beaten and strangled. He maintains that he complained, without success, "to several authorities" of having been subjected to physical violence. A number of his co-detainees could attest that he had bruises and haematomas as a result of ill-treatment.

5.4 As proof of the investigators' bias, the author cites the fact that a criminal investigation into the murder of Mr. Kot and Mr. Kroutovertsev was opened on 9 June 1996, whereas Mr. Kot died of his wounds on 13 June 1996.

Issues and proceedings before the Committee

Decision on admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee notes that the author filed an appeal with the Supreme Court of Ukraine, which confirmed the decision of the inferior court, and that the State party has not argued that the author has not exhausted domestic remedies. The Committee therefore considers that the author has met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With regard to the author's allegation that during their detention he and his wife were subjected to inhuman treatment by police officers in order to force them to testify against themselves, the Committee notes that the author submitted the communication on his own behalf, without indicating that he had been authorized to act on his wife's behalf and without explaining whether or not his wife was able to submit her own complaint. Pursuant to paragraph 1 of the Optional Protocol and rule 90 (b) of its rules of procedure, the Committee decides that it will consider only the author's complaint.

6.5 With regard to the author's allegation that the court sentenced him to death without taking account of the fact that articles 3 and 28 of the Ukrainian Constitution of 1996 had abolished capital punishment, the Committee notes that it was only as a consequence of the Constitutional Court's decision of 29 December 1999 and the Parliament's amendment of the Criminal Code and the Code of Criminal Procedure on 22 February 2000 that the State party abolished capital punishment, that is, after a final decision had been taken in the case. The Committee therefore considers that, for the purposes of admissibility, the author has not substantiated his allegation that the imposition of the death sentence in 1997 took place after the State party had abolished capital punishment. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.6 The Committee notes that the author states, concerning his allegations of ill-treatment and torture, that on 31 January 1997 he complained to a procurator who advised him to make his allegations during the trial. The State party claims that this allegation was not raised before the Donetsk regional court and that the author made the allegation only when he filed his application for judicial review. The Committee notes that, in its judgement, the Supreme Court considered the allegation and decided that it was unfounded. The Committee recalls that it is generally for the courts of State parties to the Covenant, and not for the Committee, to evaluate facts and evidence in a particular case, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice. However, nothing in the information brought to the attention of the Committee concerning this matter shows that the decisions of the Ukrainian courts or the behaviour of the competent authorities were arbitrary or amounted to a denial of justice. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol.

6.7 With regard to the author's allegations that he was denied a fair trial because the brother of one of the deceased was chief of the police station where he underwent his first interrogations, the Committee notes, first, that nothing in the documents before it leads it to conclude that these allegations were brought before the competent national authorities. Secondly, with regard to the author's claim that the charges against him were inconsistent, that the presentation of the facts by the police and the public prosecutor were biased, that the court only heard witnesses for the prosecution, and that the judges were obviously biased, the Committee considers that these allegations have not been sufficiently substantiated for the purposes of admissibility. Consequently, the Committee declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.8 The author has also alleged that his case record was tampered with in order to conceal procedural errors; the Committee notes that the author has not indicated whether or not he presented these allegations to the competent national authorities. Moreover, he has not maintained that his case record was falsified. The Committee is therefore of the view that this allegation has not been substantiated for the purposes of admissibility and is inadmissible under article 2 of the Optional Protocol.

6.9 With regard to the author's allegation that his application for judicial review had been illegally rejected by the regional court, the Committee notes that the Supreme Court of Ukraine considered his appeal and confirmed the decision of the regional court on 17 July 1997, and that a copy of the decision has been furnished by the State party. Without any other relevant information concerning the examination of the author's application for judicial review, the Committee is of the view that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.10 The Committee has taken note of the author's claim that he was sentenced to a penalty heavier than the one provided by law. The State party refutes this allegation, considering that the courts correctly characterized the author's acts under the Criminal Code and sentenced him in conformity with the law. In the light of the copies of the relevant judicial decisions furnished by the State party and, in the absence of any information indicating that these judicial decisions violate in any way the author's rights under article 15 of the Covenant, the Committee is of the view that the facts before it have not been sufficiently substantiated to meet the criteria for admissibility under article 2 of the Optional Protocol.

6.11 As for the author's complaint that he was deprived of counsel for the first five months of the investigation and that, on 17 July 1997, the Supreme Court gave its ruling in his absence and the absence of his counsel, the Committee notes that the State party has not made any objection as to admissibility and therefore proceeds to an examination of the merits of this allegation, which may raise issues under article 14, paragraphs 1 and 3 (d) and article 6, of the Covenant.

6.12 The Committee therefore proceeds to the consideration of the complaints that were declared admissible under article 14, paragraphs 1 and 3 (d) and article 6, of the Covenant.

Examination of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 First, the author alleges that he did not have the services of a counsel during his first five months of detention. The Committee notes that the State party is silent in this regard; it also notes that the copies of the relevant judicial decisions do not address the author's allegation that he was not represented for five months, even though the author had mentioned this allegation in his complaint to the Supreme Court dated 29 April 1997. Considering the nature of the case and questions dealt with during this period, particularly the author's interrogation by police officers and the reconstruction of the crime, in which the author was not invited to participate, the Committee is of the view that the author should have had the possibility of consulting and being represented by a lawyer. Consequently, and in the absence of any relevant information from the State party, the Committee is of the view that the facts before it constitute a violation of article 14, paragraph 1, of the Covenant.

7.3 Secondly, the author alleges that, subsequently, on 17 July 1997, the Supreme Court heard his case in his absence and in the absence of his counsel. The Committee notes that the State party has not challenged this allegation and has not provided any reason for this absence. The Committee finds that the decision of 17 July 1997 does not mention that the author or his counsel was present, but mentions the presence of a procurator. Moreover it is uncontested that the author had no legal representation in the early stages of the investigations. Bearing in mind the facts before it, and in the absence of any relevant observation by the State party, the Committee considers that due weight must be given to the author's allegations. The Committee recalls its jurisprudence that legal representation must be available at all stages of criminal proceedings, particularly in cases in which the accused incurs capital punishment.[2] Consequently, the Committee is of the view that the facts before it disclose a violation of article 14, paragraph 1, as well as a separate violation of article 14, paragraph 3 (d), of the Covenant.

7.4 The Committee is of the view[3] that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant if no further appeal against the death sentence is possible. In the author's case, the final sentence of death was passed without having met the requirements for a fair trial as set out in article 14 of the Covenant and thus in breach of article 6. However, this breach was remedied by the commutation of the death sentence by the Donetsk regional court's decision of 26 June 2000.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraphs 1 and 3 (d) of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The Committee is of the view that, since the author was not duly represented by a lawyer during the first months of his arrest and during part of his trial, even though he risked being sentenced to death, consideration should be given to his early release. The State party is under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Covenant entered into force for the State party on 23 March 1976, and the Optional Protocol on 25 October 1991.

[2] See for example *Robinson v. Jamaica*, communication No. 223/1987 and *Brown v. Jamaica*, communication No. 775/1997.

[3] See *Levy v. Jamaica*, op. cit; *Marshall v. Jamaica, op. cit.*

E. Communication No. 796/1998, *Reece v. Jamaica* (Views adopted on 14 July 2003, seventy-eighth session)*

Submitted by:	Lloyd Reece (represented by counsel, Ms. Penny Rogers)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	16 January 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 14 July 2003,

Having concluded its consideration of communication No. 796/1998, submitted to the Human Rights Committee on behalf of Mr. Lloyd Reece under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 16 January 1998, is Lloyd Reece, a Jamaican citizen born on 17 October 1957, currently imprisoned at St. Catherine's District Prison. He claims to be a victim of violations by Jamaica of articles 7, 9, paragraph 1, 10, paragraph 1, and 14, paragraphs 1, 2, 3, subparagraphs (a) through (d), and 5, of the International Covenant on Civil and Political Rights. The author is represented by counsel.

1.2 Both the Covenant and the Optional Protocol entered into force for the State party on 23 March 1976. The State party denounced the Optional Protocol on 23 October 1997, with effect from 23 January 1998.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The facts as submitted by the author

2.1 The author was arrested on 13 January 1983, and charged with two counts of murder with respect to events that occurred on 11 January 1983. At the preliminary hearing, he was assigned a legal aid trial lawyer. At trial before the Clarendon Circuit Court, from 20 to 27 September 1983, the author pleaded not guilty to both counts but admitted to having been at the scene of the murders when they took place. He was convicted by jury on both counts and sentenced to death.

2.2 Immediately upon his conviction and sentence, the author filed a notice of appeal and requested that the Court of Appeal grant him legal aid. A legal aid lawyer was assigned to him, but the author was not informed of the date of the appeal hearing, nor was he permitted any access to his lawyer to provide him with any instructions. He was not present at the appeal hearing on 2 October 1986, and was not informed of what occurred at the hearing beyond refusal of the appeal. On 13 November 1986, the Court of Appeal dismissed his appeal.

2.3 On 4 May 1988, the author filed a notice of intention to petition the Judicial Committee of the Privy Council. On 21 November 1988, the Judicial Committee dismissed the author's petition without reasons and refused leave to appeal.

2.4 On death row, the area to which the author was confined was also used by prisoners who were mentally ill and who, on occasion, attacked fellow prisoners. The author also refers to reports of random beatings and brutal warders.[1] He complained of unsanitary conditions, in particular of waste littering the area and the constant presence of unpleasant odours. He refers to further reports of the digging of pits for excrement and overwhelming stenches.[2] Slop buckets of human waste and stagnant water were emptied only once daily in the morning. Running water was polluted with insects and excrement, and inmates were required to share dirty plastic utensils. The daily time the author was allowed out of his cell was severely limited, sometimes to less than half an hour. These conditions caused serious detriment to his health, with skin disorders and eyesight problems developing. While he had been referred to an eye specialist by the prison doctor in 1994, he had not been allowed to see such a specialist by the time of the communication. Moreover, when he sustained a chipped bone injury to his finger in an accident, he was not taken to hospital until two days after the accident, making it impossible for the finger to heal properly and affecting his ability to write.

2.5 In April or May 1995 the author's sentence of death was commuted to life imprisonment by the Governor-General.[3] The commutation was accompanied by a determination that seven years from the date of commutation had to elapse before the length of any non-parole period could be considered. He was not informed of the decision to commute his sentence until after the event and never received any formal documentation in relation to the decision. The author had no opportunity to make any representation in relation to the decision to commute his sentence or to the decision concerning the non-parole period. He remains imprisoned at St. Catherine's District Prison.

The complaint

3.1 The author claims a violation of article 14, paragraph 3 (b), because he had inadequate time and facilities to prepare his defence at trial, and inadequate communication with counsel of his choice. He argues that his detention up until trial made it doubly important that he was able to give detailed instructions to counsel. However, prior to his preliminary hearing, he was only able to speak to his legal aid lawyer for half an hour. Moreover, he was unable to have another audience with his lawyer before or after the trial. During the time of pre-trial detention, the legal aid lawyer never visited the author and did not review the case with him at all in preparation for the trial. As a consequence, no witnesses were called on his behalf at trial. He was only able to speak to his lawyer directly from the dock, while the trial was actually in progress, and many of his instructions were simply ignored. He was further unable to go through the prosecution statements with his lawyer, who failed to point out significant discrepancies in the prosecution's evidence. The author contends that at one point at trial he informed the judge that he was unsatisfied with his legal representation, but was told that the only alternative would be for him to represent himself.

3.2 The author further alleges a violation of article 14, paragraph 3 (e), in that he had insufficient opportunity to examine, or have examined, the witnesses against him at trial, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. His lawyer made no attempt to accede to his request to call certain witnesses on his behalf, in particular, a serving Jamaican police officer, who had testified at the preliminary hearing that other police officers investigating the murders had planted evidence on the author.[4] The author submits that the primary reason why witnesses were not traced and called was that legal aid rates available to counsel were so inadequate that they are unable to make such enquiries.

3.3 The author claims a violation of article 14, paragraph 1, in that the trial judge's directions to the jury were inadequate. While the author acknowledges that it is generally for domestic tribunals to evaluate the facts and evidence in a particular case, he alleges that in the circumstances of his own case the judge's instructions were so "wholly inadequate" so as to amount to a denial of justice. Firstly, the author contends that the judge made remarks as to the possible guilt of another party, without at the same time warning the jury as to possible dangers of evidence against the author given by such a person. Secondly, in his summing up the judge made comments allegedly partial to the prosecution, including inviting the jury to draw inferences from counsel's failure to address certain issues. In addition, concerning the author's contention at trial that not all pages of his confession were a true record of his confession, the judge invited the jury to disbelieve the author on the basis that all pages were the same colour, a theory advanced by neither side. Nor did the judge adequately direct the jury on the inferences to be drawn from any statements made by the author which the jury found to be untrue. The judge also invited the jury to compare samples of the author's handwriting without securing expert assistance.

3.4 The author claims a violation of article 14, paragraphs 3 (b) and 5, in that he was not informed of his appeal hearing, that his legal representation was not of his choosing, and that he had no opportunity to instruct the lawyer assigned to represent him on appeal. He wrote several letters to the lawyer assigned to his appeal but received no reply. As a result, he had no opportunity to correct inaccuracies which arose during the course of the hearing.

3.5 Further, the author claims a violation of article 14, paragraph 3 (c), in the form of delays in various stages of the judicial proceedings. He points to the lapse of over three years between the filing of his appeal, immediately following his conviction on 27 September 1983, and the dismissal of the appeal on 13 November 1986. He does not know when the trial transcript was prepared, but contends that his counsel was provided a copy some time prior to the hearing of the appeal.

3.6 The author moreover claims a violation of article 14, paragraph 2, in that violations of article 14, paragraphs 1 and 3, which deprive an accused of the safeguards of a fair trial, also amount to a violation of the presumption of innocence. He relies for this proposition on the Committee's Views in *Perdomo et al. v. Uruguay*.[5]

3.7 In addition, the author claims a violation of article 14, paragraphs 1 and 3, subparagraphs (a), (b) and (d), in that he was not given any notice of where or how the decision to commute his sentence was taken, and that neither he nor counsel were given any opportunity to make oral or written representations as to his non-parole period. He was not informed of the material or questions considered or principles applied by the Governor-General, and the proceedings were not held in public. Moreover, the alleged failure to take into account the time the author served in custody prior to commutation of sentence (more than 12 years) when considering his non-parole period, is said to be a violation of his rights under article 9, paragraph 1, of the Covenant, in that he was subjected to arbitrary detention. He contends that the decision to commute his death sentence was effectively an extension of the original sentencing process, and that a non-parole period should have been set at the time the sentence was commuted. The guarantees of article 14 of the Covenant extend beyond conviction to the sentencing process in accordance with a general principle that the "due process requirements" applying at the conviction stage extend to the sentencing process as well.[6] The author contends that he enjoyed none of these guarantees at the point of commutation.

3.8 The author claims a violation of articles 7 and 10, paragraph 1, in the conditions of his imprisonment at St. Catherine's District Prison, described in paragraph 2.4 above. The author refers to the Committee's jurisprudence to the effect that imprisonment "in conditions seriously detrimental to a prisoner's health" violate these provisions.[7]

3.9 The author further contends that the mental anguish and anxiety relating to death row incarceration violated articles 7 and 10, paragraph 1. The prolonged isolation over 12 years and enforced idleness exacerbated his mental suffering to the extent that this "death row phenomenon" constituted cruel, inhuman and degrading treatment. The author relies to this end on the jurisprudence of the European Court of Human Rights in *Soering v. United Kingdom*.[8]

3.10 On exhaustion of domestic remedies, the author contends he was unable to pursue a domestic constitutional challenge because of an inability to raise the requisite funds paired with the unwillingness of the State party to provide State funds for such a purpose.

The State party's submissions on the admissibility and merits of the communication

4.1 By Note of 2 October 1998, the State party made its submissions on the admissibility and merits of the communication.

4.2 As to the alleged violation of article 14, paragraph 3 (b) and (e), regarding the manner in which the author's legal aid lawyer conducted his trial, the State party recalls that it has consistently maintained that it is not responsible for the manner in which counsel conducts a case. It argues that the State's duty is to appoint competent counsel, and not to interfere with the conduct of the case, whether by act or omission. After appointment, the State party is no more responsible for the performance of legal aid counsel than it would be for the performance of privately retained counsel. The State party applies the same principles to the alleged violations of article 14, paragraph 3 and 5, in relation to the manner in which counsel conducted the appeal.

4.3 As to the alleged violation of article 14, paragraph 1, in the form of the judge's instructions to the jury, the State party notes the author's acknowledgment that it is generally for the courts of the State to evaluate the judge's instructions to the jury, unless it can be shown that the instructions were clearly arbitrary or amounted to a denial of justice. The State party points out that in the present case the judge's instructions were evaluated by the Court of Appeal in detail and thereafter the Privy Council, both of which found no impropriety. The State party denies that the judge's instructions were such that the Committee should disregard the decision of the appellate courts.

4.4 As to the alleged violation of article 14, paragraph 3 (c), in the form of the three year period between the lodging of the notice of appeal and the Court of Appeal's judgement, the State party argues that while the delay was longer than desirable, it did not unduly prejudice the author and therefore did not amount to a breach of the Covenant.

4.5 As to the alleged violations of the Covenant arising from the imposition of a non-parole period after the commutation of the author's sentence, the State party denies any incompatibility of the process with the Covenant. It points out that the non-parole period was guided by the Offences Against Persons (Amendment) Act and that all the relevant factors, including any evidence of the author's physical and mental health and so forth, were laid before the Governor-General when the trial judge's report was considered. The State party maintains that the fact that neither the author nor his counsel had the opportunity to make representations did not make the process inherently unfair.

Subsequent submissions of the parties

5.1 The author made a subsequent submission by letter of 18 December 1998, and the State party made further comments in a Note dated 25 May 1999. Both submissions reiterated their earlier arguments described above.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering the claims contained in the communication, the Human Rights Committee must, in accordance with rule 87 of the rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that at the time of submission of the communication, Jamaica was a party to the Optional Protocol. Accordingly, the withdrawal by the State party from the Optional Protocol on 23 October 1997, with effect as of 23 January 1998, does not affect the competence of the Committee to consider this communication.

6.3 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement. With respect to the exhaustion of domestic remedies, the Committee observes that the State party has not contended that there are any domestic remedies yet to be exhausted by the author. In the absence of any further objection by the State party to the admissibility of the communication, the Committee is of the view that the communication is admissible and proceeds to a consideration of the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 As to the claim of a violation of article 14, paragraph 3 (b) and (e), in that the author had inadequate time and facilities to prepare his trial defence at trial and that counsel conducted his defence poorly, the Committee reiterates its jurisprudence that in such a situation, it would have been incumbent on the author or his counsel to request an adjournment at the beginning of the trial, if it was felt that they had not had sufficient opportunity to properly prepare a defence. The trial transcript does not disclose any such application.[9] As to the issues raised by the author's objections to counsel's conduct of the trial, the Committee recalls that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.[10] The Committee is of the view that, in the present case, there is no indication that counsel's conduct of the trial was manifestly incompatible with his professional responsibilities. Accordingly, the Committee does not find a violation of the Covenant in respect of these issues.

7.3 On the alleged violation of article 14, paragraph 1, in that the trial judge's directions on the evidence to the jury were inadequate, the Committee refers to its previous jurisprudence that it is not for the Committee to review specific instructions to the jury by the trial judge unless it could be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. In the present case, the Committee observes that the evidence in the case as well as the judge's directions to the jury were extensively examined upon appeal, and it does not discern clear arbitrariness or a denial of justice thereby.[11] The Committee thus does not find a violation of the Covenant in this respect.

7.4 As to the claim of a violation of article 14, paragraphs 3 (b) and 5, concerning the preparation and conduct of the appeal, the Committee notes that the author signed the application for leave to appeal which detailed the grounds of appeal and is therefore not in a position to claim he was unable to instruct his appellate lawyer. Moreover, the Committee recalls its jurisprudence (referred to in paragraph 7.2 above) that a State party cannot generally be held responsible for the conduct of a lawyer in court. In this case, the Committee does not discern any exceptional matter in the manner the appeal was conducted that would warrant departure from this approach. Accordingly, the Committee does not find a violation of the Covenant in respect of these issues.

7.5 As to the claim of a violation of article 14, paragraph 3 (c), in the form of the delay of three years and one month between the filing of his notice of appeal and its eventual disposition, the Committee notes the particular circumstance of this case that the author lodged his appeal immediately at the close of trial on the day that he was convicted. Noting also that the State party has not provided any explanation for the delay or presented any factors by which the delay could be attributed to the author, the Committee considers that the facts disclose a violation of article 14, paragraph 3 (c).

7.6 As to the claim of a violation of article 14, paragraph 2, deriving from violations of fair trial guarantees in article 14, paragraphs 1 and 3, the Committee observes that, in the light of its findings on the above in respect of the latter provisions, no separate issue arises under article 14, paragraph 2.

7.7 As to the author's claims of a violation of articles 9, paragraph 1, and 14, paragraphs 1 and 3, subparagraphs (a), (b) and (d), arising from the commutation of his sentence and the setting of a seven year period before parole issues might arise, the Committee refers to its previous jurisprudence that the commutation process is not one attracting the guarantees of article 14.[12] Nor does the Committee share the view that a substitution of the death penalty with life imprisonment, with a prospect of parole in the future, is a "re-sentencing" tainted with arbitrariness. It follows from this conclusion that the author continued to be legitimately detained pursuant to the original sentence, as modified by the decision of commutation, and that no issue of detention contrary to article 9 arises. Accordingly, the Committee does not find a violation of the Covenant with respect to these matters.

7.8 As to the author's claims under the articles 7 and 10, paragraph 1, concerning the specific conditions and length of his detention on death row, the Committee must, in the absence of any responses by the State party, give due credence to the author's allegations as not having been properly refuted. The Committee considers, as it has repeatedly found in respect of similar substantiated allegations,[13] that the author's conditions of detention as described violate his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to separately consider the claims arising under article 7.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 10, paragraph 1, and 14, paragraph 3 (c), of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The State party is also under an obligation to improve the present conditions of detention of the author, or to release him.

10. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12 (2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol with respect to this case. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals

within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] *Prison Conditions in Jamaica: An Americas Watch Report* (Human Rights Watch, New York, May 1990).

[2] Ibid. at 13 and, further, *Report of the Task Force on Correctional Services* (Ministry of Public Services, Jamaica, March 1989).

[3] The sentence of death penalty was commuted to life imprisonment pursuant to the judgement of the Privy Council in *Pratt and Morgan v. Jamaica.* It is unclear on exactly what date the decision of commutation was taken by the Governor-General.

[4] In *Bell v. Director of Public Prosecutions* [1986] LRC 392, the Privy Council accepted that in Jamaica there exists a real difficulty in securing the attendance of witnesses at court.

[5] Case No. 8/1977, Views adopted on 3 April 1980.

[6] The author refers to judicial authority for this proposition: *R. v. Newton* (1973) 1 WLR 233 and *Gardner v. State of Florida* 430 US 439, 358 (1977).

[7] *Valentini de Bazzano et al. v. Uruguay* Case No. 5/1977, Views adopted on 18 August 1979.

[8] [1989] 11 EHRR 439.

[9] See, for example, *Simpson v. Jamaica* Case No. 695/1996, Views adopted on 31 October 2001.

[10] Ibid.

[11] *Henry and Douglas v. Jamaica* Case No. 571/1994, Views adopted on 25 July 1996.

[12] *Kennedy v. Trinidad and Tobago* Case No. 845/1998, Views adopted on 26 March 2002.

[13] See, for example, *Sextus v. Trinidad and Tobago* Case No. 818/1998, Views adopted on 16 July 2001.

F. Communication No. 814/1998, *Pastukhov v. Belarus* (Views adopted on 5 August 2003, seventy-eighth session)*

Submitted by:	Mr. Mikhail Ivanovich Pastukhov
Alleged victim:	The author
State party:	Belarus
Date of communication:	11 February 1998 (initial communication)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 5 August 2003,

Having concluded its consideration of communication No. 814/1998, submitted to the Human Rights Committee by Mr. Mikhail Ivanovich Pastukhov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author is Mr. Mikhail Ivanovich Pastukhov, a Belarusian citizen resident in Minsk (Belarus). He claims to be a victim of a violation by Belarus of article 2 of the International Covenant on Civil and Political Rights. The communication also appears to raise issues relating to article 14, paragraph 1, and article 25 (c) of the Covenant. The author is not represented by counsel.

1.2 The Covenant and the Optional Protocol thereto entered into force for Belarus on 23 March 1976 and 30 December 1992 respectively.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

An individual opinion signed by Committee members Ms. Ruth Wedgwood and Mr. Walter Kälin is appended to the present document.

The facts as submitted by the author

2.1 On 28 April 1994, the Supreme Council (Parliament), acting according to the relevant legal procedure and, in particular, the Constitution of 15 March 1994, elected the author a judge of the Constitutional Court for a period of 11 years.

2.2 By a presidential decree of 24 January 1997, the author lost his post on the ground that his term of office had expired following the entry into force of the new Constitution of 25 November 1996[1]

2.3 On 11 February 1997, the author applied to a district court for reinstatement. On 21 February 1997, the court refused to admit the application.

2.4 On 31 March 1997, the author appealed that decision to the Minsk Municipal Court, which rejected his appeal on 10 April 1997 on the ground that the courts were not competent to consider disputes over the reinstatement of persons, such as Constitutional Court judges, who had been appointed by the Supreme Council of the Republic of Belarus.

2.5 On 2 June 1997, the author applied for judicial review to the Supreme Court. On 13 June 1997, the Supreme Court dismissed the application on the above ground.

The complaint

3.1 The author contends that the presidential decree of 24 January 1997 is unlawful.

3.2 He explains that the decree refers to article 146 of the Constitution of 25 November 1996, which provides that the President of the Republic, the Parliament and the Government shall, within two months of the entry into force of the Constitution, appoint and set up the organs within their jurisdiction. He argues that the Constitution cannot, any more than any other law, retroactively affect a citizen's legal standing, and contends with respect to his own situation that judges can only be replaced when their posts fall vacant and that it was therefore manifestly arbitrary to abridge his term of office.

3.3 He further explains that the activities of the Constitutional Court are governed by a special law, the Constitutional Court of the Republic of Belarus Act. Article 18 of the Act contains an exhaustive list of the circumstances in which judges' terms of office may be curtailed. The ground cited in the decree of 24 January 1997 is not among them and the decree must therefore be considered unlawful. In addition, the decree is in violation of article 25 of the Act, which guarantees the independence of the judiciary through means including a procedure for judges' suspension and removal from office.

3.4 The author maintains that, in breach of article 2 of the Covenant, the courts wrongly denied him the protection of the law in his dispute with the Head of State.

3.5 The author states that all internal remedies have been exhausted and that the matter has not been submitted to any other procedure of international investigation or settlement.

The State party's observations concerning admissibility and the merits of the communication

4.1 In its observations of 14 July 1998, the State party disputes the admissibility of the communication.

4.2 It maintains that the judicial decisions concerning the author's applications were consistent with article 224 of the Labour Code. This article provides that any dispute concerning the ending of the employment of persons appointed by the President of the Republic, elected, appointed or confirmed by the Parliament or elected by local councils of deputies must be examined as prescribed by law, and the State party therefore argues that the Labour Code provides for persons in the same category as the author, namely persons elected by the Parliament, a dispute settlement procedure differing from the usual one. The State party concludes that the author did not follow the procedure provided for by law and that his complaint that he was unable to enforce his rights is therefore baseless.

4.3 In its observations of 24 January 2001, the State party repeats that the author's service as a judge was terminated by presidential decree on the ground of expiry of the term of office of Constitutional Court judges. It again stresses that, by virtue of article 224 of the Labour Code, the author's dispute was not a matter for the courts.

4.4 The State party further maintains that the Labour Code of 1 January 2000 superseded the previous Labour Code (and, therefore, article 224) and gave full effect not only to the provisions of article 60 of the Constitution of 25 November 1996 guaranteeing the protection of personal rights and freedoms by a competent, independent and impartial court within the time-limits set by law, but also to the provisions of article 2 of the International Covenant on Civil and Political Rights concerning judicial remedies.

4.5 The State party declares that henceforth, pursuant to article 242 of the Labour Code, everyone has the right to apply to a court within one month for reinstatement in their post.

4.6 The State party therefore asserts that the new Labour Code has removed all restrictions on judicial recourse and that the author could have appealed to the courts within the specified time limits. It says that it has no information concerning the author's situation in that respect.

The author's comments

5.1 In his comments of 20 March 2002, the author first reiterates the reasons why he considers the presidential decree of 24 January 1997 unlawful. He states that application of the decree cannot be justified as having been "in connection with the expiry of the judicial term of office" since the latter phrase does not appear in current Belarusian law. Consequently, the action by the President of the Republic constituted interference in the activities of the Constitutional Court and an infringement of his, the author's, civil and labour rights.

5.2 Next, the author contends that the State party's reasoning concerning the courts' competence to deal with the matter at issue is neither convincing nor based on the law in force at the time.

5.3 The author explains that article 61 of the Constitution of 15 March 1994 guaranteed the protection of personal rights and freedoms by a competent, independent and impartial court, a principle that was directly applicable in the absence of any law restricting it to particular categories of citizens. In the author's opinion, the principle was therefore applicable to judges of the higher courts, including the Constitutional Court, with respect to alleged breaches of their labour rights.

5.4 The author further asserts that article 4 of the Code of Civil Procedure made it obligatory for the courts to admit any complaint from a citizen for examination.

5.5 The author asserts that, in refusing to examine his application, the district court, the Minsk Municipal Court and the Supreme Court were in breach of the above-mentioned legislation. He alleges that the courts acted as they did because the dispute in question involved the Head of State, who could have dismissed the judges concerned. The author emphasizes that Belarusian courts are not independent from the executive, in particular the President of the Republic.

5.6 The author adds that article 224 of the Labour Code would only have been applicable if his application had been rejected by the courts following a trial. Since the courts had refused even to examine his application, the State party's invocation of that article was misplaced.

5.7 Third, the author refutes the State party's argument that the new Labour Code allowed him to file an appeal with the courts within the specified time limits. He points out in this regard that he was removed from the bench more than four years before the Labour Code came into force.

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 As required by article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 With regard to the question of exhaustion of domestic remedies, the Committee took note of the State party's arguments to the effect, firstly, that the author's complaint was not within the competence of the courts and, second, that under the new Labour Code of 1 January 2000 an appeal could be made to the courts. The Committee also took into consideration the author's arguments that, pursuant to the Constitution, the Code of Civil Procedure and the Labour Code in force at the time, the courts were obliged to consider his complaint and that the State party's invocation of the new Labour Code was irrelevant inasmuch as the time limit for appeal set in that law could not be applied retroactively to a dispute that had arisen in 1997.

6.4 The Committee recalls that it is implicit in rule 91 of its rules of procedure and article 4, paragraph 2, of the Optional Protocol that a State party to the Covenant should make available to the Committee all the information at its disposal, including, at the stage of determination of the admissibility of the communication, detailed information about remedies available to the victims of the alleged violation in the circumstances of their cases. The Committee considers that in the first instance the State party gave no information on effective, available remedies. The Committee considers that in the second instance the State party referred to a remedy before the courts under the new Labour Code that, according to the information at the Committee's disposal, cannot be linked to the specific circumstances of the author's case since it would not have been available with respect to a loss of employment that occurred three years before it was instituted. The Committee is therefore satisfied that the author met the conditions of article 5, paragraph 2 (b), of the Optional Protocol.

6.5 In the light of the above findings, the Committee declares the author's communication admissible, raising issues under articles 14 and 25 of the Covenant, in conjunction with article 2. Accordingly, the Committee proceeds to the examination of the merits of the communication, pursuant to article 5, paragraph 1, of the Optional Protocol.

Consideration on the merits

7.1 Pursuant to article 5, paragraph 1, of the Optional Protocol, the Human Rights Committee has examined the communication in the light of all written information made available to it by the parties.

7.2 In reaching its Views, the Committee has taken into account, first, the fact that the State party did not provide it with sufficiently well supported arguments concerning the effective remedies available in the present case and, second, that it did not respond to the author's allegations concerning either the termination of his service on the bench or the independence of the courts in that regard. The Committee draws attention to the fact that article 4, paragraph 2, of the Optional Protocol requires States parties to submit to it written explanations or statements clarifying the matter and the remedies, if any, that they may have taken. That being so, the allegations in question must be recognized as carrying full weight, since they were adequately supported.

7.3 The Committee takes note of the author's claim that he could not be removed from the bench since he had, in accordance with the law in force at the time, been elected a judge on 28 April 1994 for a term of office of 11 years. The Committee also notes that presidential decree of 24 January 1997 No. 106 was not based on the replacement of the Constitutional Court with a new court but that the decree referred to the author in person and the sole reason given in the presidential decree for the dismissal of the author was stated as the expiry of his term as Constitutional Court judge, which was manifestly not the case. Furthermore, no effective judicial protections were available to the author to contest his dismissal by the executive. In these circumstances, the Committee considers that the author's dismissal from his position as a judge of the Constitutional Court, several years before the expiry of the term for which he had been appointed, constituted an attack on the independence of the judiciary and failed to respect the author's right of access, on general terms of equality, to public service in his country. Consequently, there has been a violation of article 25 (c) of the Covenant, read in conjunction with article 14, paragraph 1, on the independence of the judiciary and the provisions of article 2.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information at its disposal reveals a violation by the State party of article 25 (c) of the Covenant, read in conjunction with article 14, paragraph 1, on the independence of the judiciary and the provisions of article 2.

9. By virtue of article 2, paragraph 3, of the Covenant, the author has a right to an effective remedy including compensation. It is incumbent on the State party to ensure that there is no recurrence of such violations.

10. The Committee points out that, by acceding to the Optional Protocol, Belarus recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation is established. Accordingly, the Committee wishes to receive from the State party, within 90 days of the transmission of the present Views, information about the measures taken to give them effect. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] "Presidential decree No. 106 of 24 January 1997 dismissing Mr. Mikhail Pastukhov from his duties as judge of the Constitutional Court: In conformity with article 146 of the Belarus Constitution, Mr. Pastukhov is dismissed from his duties as judge of the Constitutional Court upon expiry of his term of office."

APPENDIX

Individual opinion of Committee members Ms. Ruth Wedgwood and Mr. Walter Kälin (concurring)

The dismissal of Judge Mikhail Ivanovich Pastukhov from his position as a judge of the Belarus Constitutional Court was part of an attempt to diminish the independence of the judiciary. While the organization of a national court system may be changed by legitimate democratic means, the change here was part of an attempt to consolidate power in a single branch of government through the pretence of a constitutional referendum. It has interrupted the state party's fledgling progress towards an independent judiciary. As such, the presidential decree dismissing Judge Pastukhov from his office as judge of the Constitutional Court violated the rights guaranteed to him and to the people of Belarus under Articles 14 and 25 of the Covenant.

(*Signed*): Ruth Wedgwood

(*Signed*): Walter Kälin

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

G. Communication No. 829/1998, *Judge v. Canada**
(Views adopted on 5 August 2003, seventy-eighth session)

Submitted by:	Roger Judge (represented by counsel, Mr. Eric Sutton)
Alleged victim:	The author
State party:	Canada
Date of communication:	7 August 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 5 August 2002,

Having concluded its consideration of communication No. 829/1998, submitted to the Human Rights Committee on behalf of Mr. Roger Judge under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 7 August 1998, is Mr. Roger Judge, a citizen of the United States of America, at the time of the submission detained at Ste-Anne-des-Plaines, Quebec, Canada, and deported to the United States on the day of submission, i.e. 7 August 1998. He claims to be a victim of violations by Canada of articles 6, 7, 10 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to rule 85 of the Committee's rules of procedure, Ms. Ruth Wedgwood did not participate in adoption of the Views.

Individual opinions signed by Committee members Mr. Ando, Ms. Chanet, Mr. Lallah and Mr. Solari Yrigoyen are appended to the present document.

Facts as submitted by the author

2.1 On 15 April 1987, the author was convicted on two counts of first-degree murder and possession of an instrument of crime, by the Court of Common Pleas of Philadelphia, Pennsylvania. On 12 June 1987, he was sentenced to death, by electric chair. He escaped from prison on 14 June 1987 and fled to Canada.[1]

2.2 On 13 July 1988, the author was convicted of two robberies committed in Vancouver, Canada. On 8 August 1988, he was sentenced to 10 years' imprisonment. The author appealed his convictions, but on 1 March 1991, his appeal was dismissed.

2.3 On 15 June 1993, the author was ordered deported from Canada. The order was conditional as he had announced his intention to claim refugee status. On 8 June 1994, he withdrew his claim for refugee status, at which point the deportation order became effective.

2.4 On 26 January 1995, on recommendation of the Correctional Services of Canada, his case was reviewed by the National Parole Board which ordered him detained until expiry of his sentence, i.e. 8 August 1998.[2]

2.5 On 10 November 1997, the author wrote to the Minister of Citizenship and Immigration requesting ministerial intervention with a view to staying the deportation order against him, until such time as a request for extradition from the United States authorities might be sought and received in his case. If removed under the Extradition Treaty, Canada could have asked for assurances from the United States that he not be executed. In a letter, dated 18 February 1998, the Minister refused his request.[3]

2.6 The author applied to the Federal Court of Canada for leave to commence an application for judicial review of the Minister's refusal. In this application, the author requested a stay of the implementation of the deportation order until such time as he would be surrendered for extradition, and a declaration that his detention in Canada and deportation to the United States violated his rights under the Canadian Charter. The author's application for leave was denied on 23 June 1998. No reasons were provided and no appeal is possible from the refusal to grant leave.

2.7 The author then petitioned the Superior Court of Quebec, whose jurisdiction is concurrent with that of the Federal Court of Canada, for relief identical to that sought before the Federal Court. On 6 August 1998, the Superior Court declined jurisdiction given that proceedings had already been undertaken in the Federal Court, albeit unsuccessfully.

2.8 The author contends that, although the ruling of the Superior Court of Quebec could be appealed to the Court of Appeal, it cannot be considered an effective remedy, as the issue would be limited to the jurisdiction of the court rather than the merits of the case.

The complaint

3.1 The author claims that Canada imposed mental suffering upon him that amounts to cruel, inhuman and degrading treatment or punishment, having detained him for ten years while the certainty of capital punishment was hanging over his head at the conclusion of his sentence, and this constitutes a breach of article 7 of the Covenant. He argues that he suffered from the "death row phenomenon", during his detention in Canada. This is explained as a state of mental or psychological anguish, and, according to him, it matters little that he would not be executed on Canadian soil. The author claims that the State party had no valid sentencing objective since he was sentenced to death in any event, even though in another State party, and therefore only served to prolong the agony of his confinement while he awaited deportation and execution. It is also submitted that in this respect, the author was not treated with humanity and respect for the inherent dignity of the human person, in violation of article 10 of the Covenant.

3.2 The author claims that "by detaining [him] for ten years despite the fact that he faced certain execution at the end of his sentence, and proposing now to remove him to the United States, Canada has violated [his] right to life, in violation of article 6 of the Covenant".

3.3 The author also claims that, because of his status as a fugitive he is denied a full appeal in the United States, under Pennsylvanian law, and therefore by returning him to the United States Canada participated in a violation of article 14, paragraph 5, of the Covenant. In this regard, the author states that the trial judge made errors in instructing the jury, which would have laid the groundwork for appeals against both his conviction and sentence.

State party's observations on admissibility

4.1 The State party contends that the author's claims are inadmissible for failure to exhaust domestic remedies, failure to raise issues under the Covenant, failure to substantiate his claims and incompatibility with the Covenant.

4.2 On the issue of non-exhaustion with respect to the author's detention in Canada, the State party argues firstly that the author failed to raise his claims before the competent courts in Canada at the material times. Both during his 1988 sentencing hearing and on appeal of his convictions of robbery the author failed to complain, as he now alleges, that a 10-year sentence, in light of his convictions and sentences in the United States, constituted cruel treatment or punishment in violation of section 12 of the Canadian Charter of Rights and Freedoms. These arguments were not made until 1998, when the author's removal from Canada was imminent.

4.3 Secondly, the State party argues that the author failed to appeal to the Appeal Division of the National Parole Board of Canada or to challenge before the courts both the National Parole Board's decision not to release him before the expiration of his full sentence and the annual reviews of that decision. If he had been successful with these appeal avenues, he might have been released prior to the expiration of his sentence. Failure to pursue such remedies is clearly inconsistent with the author's position that Canada violated his Covenant rights in detaining him in Canada rather than removing him to the United States.

4.4 Thirdly, the State party argues that if the author had wanted to be removed to the United States rather than continue to be detained in Canada, he could also have requested the Department of Citizenship and Immigration to intervene before the National Parole Board for the purposes of arguing that he be released and removed to the United States Furthermore, he could have applied to have been transferred to Pennsylvania pursuant to the Transfer of Offenders Treaty between Canada and the United States of America on the Execution of Penal Sentences. In the State party's view, the author's failure diligently to pursue such avenues casts doubt on the genuineness of his assertion that he wanted to be removed to the United States, where he had been sentenced to death.

4.5 On the issue of non-exhaustion with respect to the author's request for a stay of the deportation order to the United States, the State party submits that the author failed to appeal the ruling of the Superior Court of Quebec to the Court of Appeal. Contrary to the author's view, that this remedy would not be useful as it would be limited to the jurisdiction of the court rather than the merits of the case, the State party argues that the author's petition was dismissed for both procedural and substantive reasons, and, therefore, the Court of Appeal could have reviewed the judgement on the merits.

4.6 The State party contends that the author has failed to show that his detention and subsequent removal to the United States raise any issues under articles 6, 7, 10 or 14, paragraph 5 of the Covenant. If the Committee is of the opinion that these articles do apply to the instant case, the State party argues that the author has failed to substantiate any of these claims for the purposes of admissibility.

4.7 With respect to the alleged violation of articles 7 and 10, the State party argues that the author has not cited any authority in support of his proposition that the "death row phenomenon" can apply to a prisoner detained in an abolitionist State for crimes committed in that State, where that person has been previously sentenced to capital punishment in another State. The author was sentenced to imprisonment for robberies he committed in Canada and was not on death row in Canada. It is submitted, therefore, that the "death row phenomenon" does not apply in the circumstances and he has no claim under articles 7 and 10.

4.8 On the author's argument that the sentencing in Canada had no valid objective as he had been sentenced to death in the United States, the State party submits that the sentencing principle of retribution, denunciation and deterrence require the imposition of a sentence in Canada for crimes committed in Canada.

4.9 According to the State party, if fugitives in Canada facing the death penalty were not prosecuted and sentenced for crimes in Canada, this would lead to potential abuses. First, it would create a double standard of justice. Such fugitives would be immune from prosecution while individuals not facing the death penalty would be prosecuted and sentenced, even though the crime committed in Canada was the same in both cases. Similarly, it would encourage lawlessness among such fugitives since in Canada they would be de facto immune from prosecution and imprisonment. In essence, fugitives sentenced to death for murder in the United States would be given a "carte blanche" to commit subsequent offences in Canada.

4.10 If the Committee were to find that the facts of this case do raise issues under articles 7 and 10, the State party submits that the author has not substantiated a violation of these articles for the purposes of admissibility. The State party argues that the Committee has on many occasions reiterated that lengthy detention on death row does not constitute a violation of articles 7 and 10 in the absence of some further compelling circumstances.[4] It states that the facts and circumstances of each case need to be examined, and that in the past the Committee has had regard to the relevant personal factors of the author, the specific conditions of detention on death row and whether the proposed method of execution is particularly abhorrent. No such circumstances apply in this case. Moreover, it states that, where the delay in awaiting execution is the fault of the accused, such as where he escapes custody, the accused cannot be allowed to take advantage of this delay. In this case, the delay arises from the author's own criminal acts, his escape and the robberies he committed in Canada.[5]

4.11 With respect to the alleged violation of article 6, the State party states that the author has provided no authority for his proposition that *detaining* an individual for crimes committed in that State despite the fact that the same person has been sentenced to death in another State raises an issue under article 6. The author was sentenced in Canada for robberies he committed there and is not facing the death penalty in Canada.

4.12 The State party contends that the author has failed to substantiate his claim that his *deportation* from Canada would violate article 6. It recalls the Committee's jurisprudence that "if a State party takes a decision relating to a person within its jurisdiction and the necessary and foreseeable consequences is that the person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant".[6] The State party also invokes the Committee's decision in *Reid v. Jamaica*, when it decided that the requirement of article 6 that a sentence of death may be "imposed in accordance with the law" implied that the procedural guarantees prescribed in the Covenant were observed.[7] According to the State party, if the procedural guarantees of the Covenant were observed, there is no violation of article 6. The only due process issue raised by the author was the narrower appeal of conviction and sentence allowed under Pennsylvanian law. In this respect, the State party contends that the author has not substantiated his claim that he was deprived of his right to review by a higher tribunal and it refers mutatis mutandis to its submissions on article 14, paragraph 5, (below).

4.13 On article 14, paragraph 5, of the Covenant, the State party presents several arguments to demonstrate that an issue under this article does not arise. Firstly, it contends that the author's complaint has its basis in the law of the United States, State of Pennsylvania and not in Canadian law. Therefore, the author has no prima facie claim against Canada.

4.14 Secondly, the State party contends that the author's right to review by a higher tribunal should be treated under article 6 and not separately under article 14. It argues that, given that the Committee interprets article 6, paragraph 2, as requiring the maintenance of procedural guarantees in the Covenant, including the right to review by the higher tribunal stipulated in article 14, paragraph 5, to the extent that this case raises issues under article 6, this right to review should be treated under article 6 only.

4.15 Thirdly, the State party argues that the author's detention in and removal from Canada does not raise an issue under article 14, as his incarceration for robberies committed in Canada did not have any necessary and foreseeable consequence on his right to have his convictions and sentences reviewed in Pennsylvania. It is also submitted that the author's removal did not have any necessary and foreseeable consequence on his appeal rights since the author's appeal had already taken place in 1991, while he was imprisoned in Canada.

4.16 The State party argues that, although in the United States a prisoner's rights may be adversely affected in the event that he escapes from custody, the author has failed to substantiate his claim that his right to review by a higher tribunal was violated. It encloses the judgement of the Supreme Court of Pennsylvania on the author's appeal, indicating that the Supreme Court of Pennsylvania is statutorily mandated to review all death sentences, in particular the sufficiency of the evidence to sustain a conviction for first degree murder. This statutory review was undertaken with respect to the author's case, on 22 October 1991, at which he was legally represented. The Supreme Court affirmed both the conviction and sentence. On the allegation that the trial judge committed errors in instructing the jury and that those errors had not been reviewed by the Supreme Court, the State party submits that even if the judge so erred, upon a realistic view of the evidence, a properly instructed jury could not have come to any other conclusion than that reached by the jury in the author's trial.

4.17 The State party further submits that two additional review recourses are available to the author in the United States. The first is a petition filed in the Court of Common Pleas under Pennsylvania's Post-Conviction Relief Act (PCRA) in which constitutional issues may be raised. The State party claims that the author has already filed a petition under this Act. The second is a petition for writ of habeas corpus filed in the District Court for the Eastern District of Pennsylvania. This court has the power to overturn the judgements of the courts of the Commonwealth of Pennsylvania, if it concludes that the conviction was pronounced in violation of rights guaranteed to criminal defendants under federal law. If the author is unsuccessful in both of these petitions, he may appeal to the higher courts and ultimately to the United States Supreme Court.

4.18 In addition, the State party submits that the author could petition the Governor of Pennsylvania for clemency or to have his sentence commuted to a less severe one. Prior flight does not preclude such an application. According to the State party, in light of the recourses available to a prisoner on death row, only two executions were carried out in Pennsylvania over the past thirty years.

4.19 Finally, with a view to admissibility of the communication as a whole, the State party argues that it is incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol, and article 5, paragraph 1 of the Covenant. It is submitted that the provisions of the Covenant should not be raised as a shield to criminal liability and the author should not be allowed to rely on the Covenant to support his argument that he should not have been prosecuted in Canada for crimes he committed there. Moreover, the Covenant should not be used by those who through their own criminal acts have voluntarily waived certain rights. The State party contends that the author's claims are contradictory. On the one hand, he claims that his removal from Canada to the United States violates articles 6 and 14, paragraph 5 of the Covenant, on the other, that his detention violates articles 7 and 10. Canada is alleged therefore, to violate the Covenant by removing him as well as not removing him.

State party's response on the merits

5.1 With respect to the allegation of a violation of articles 7 and 10, the State party submits that contrary to what is implied in the author's submissions, the "death row phenomenon" is not solely the psychological stress experienced by inmates sentenced to death, but relates also to other conditions including, the periodic fixing of execution dates, followed by reprieves, physical abuse, inadequate food and isolation.

5.2 With respect to the author's request for a stay of his deportation until such time as Canada received an extradition request and an assurance that the death penalty would not be carried out, the State party submits that the United States has no obligation to seek extradition of a fugitive nor to give such assurances. The Government of Canada cannot be expected to wait for such a request or to wait for the granting of such assurances before removing fugitives to the United States. The danger of a fugitive going unpunished, the lack of authority to detain him while waiting for an extradition request and the importance of not providing a safe haven for those accused of or found guilty of murder, militate against the existence of such an obligation. Moreover, the Minister of Citizenship and Immigration has a statutory obligation to execute a removal order as soon as reasonably practicable.

5.3 On the alleged violation of article 6 and the author's contention that errors were committed during his trial in Pennsylvania, which would have provided the basis for an appeal, the State party states that it is not for the Committee to review the facts and evidence of a trial unless it could be shown to have been arbitrary or a denial of justice.[8] It would be inappropriate to impose an obligation on it to review trial proceedings, particularly given that they occurred in the United States.

5.4 In relation to the allegation of a violation of article 14, paragraph 5, the State party submits that this article does not specify what type of review is required and refers to the *Travaux Préparatoires* of the Covenant, which it claims envisaged a broad provision that recognized the principle of a right to review while leaving the type of review procedure to be determined in accordance with their respective legal systems.[9]

5.5 The State party reiterates that the author's case was fully reviewed by the Supreme Court of Pennsylvania. It submits that, although originally in Pennsylvania a defendant who escaped custody was held to have forfeited his right to a full appellate review, the Supreme Court of this State has recently departed from this position, holding that a fugitive should be allowed to exercise his post-trial rights in the same manner as he would have done had he not become a fugitive. This is dependent, the State party clarifies, on whether the fugitive returns on time to file post-trial motions or an appeal. It also notes that filing deadlines are subject to exceptions which allow for late filing.[10]

The author's comments on the State party's response on admissibility and the merits

6.1 In relation to the State party's arguments on non-exhaustion of domestic remedies with respect to the author's detention in Canada, the author submits that it was not until 1993, almost five years after his robbery convictions, that he was ordered deported. He argues that he could have been granted early parole for the purposes of deportation to the United States and as such could not have known in 1988 that Canada would see fit to detain him for the full 10 years of his sentence. Furthermore, the author could not have known in 1988 that although the United States was willing to seek extradition, it would not do so "as the eventual deportation of the author to the United States appeared less problematic".

6.2 On the question of an appeal to the National Parole Board, including appeals of the annual reviews, the author submits that appeals of this nature would have been ineffective as, based on the evidence, the Board could only find that "if released" the author would likely cause, inter alia, serious harm to another person prior to expiry of sentence. However, as in reality the author would not have been released on completion of two-thirds of his sentence, but would have been turned over to the Canadian immigration services to be deported, the prison authorities should not have submitted the author's case to the Parole Board for review in the first place. Once seized with the case, the Board could not refuse to rule on the risk of harm, were the author to be released.

6.3 On the issue of the possibility of applying for transfer to the United States pursuant to the Transfer of Offenders Treaty, the author argues that the consent of both States parties is necessary for such a transfer and that Canada would never have agreed considering its refusal to deport him before he had served his full term of imprisonment. Further, the author argues that the onus should not be on him to pursue legal remedies, all of which he considers would have been futile, to hasten his return to the jurisdiction where he was sentenced to death.

6.4 With respect to a possible appeal of the author's request for a stay of the deportation order from the Superior Court of Quebec, the author submits that this decision was rendered orally on 6 August 1998, at approximately 20:00. The Government of Canada removed the author in the early hours of 7 August 1998, before any appeal could be launched. Therefore, any appeal would have been moot and futile because the very subject of the proceedings was no longer within Canadian jurisdiction.

6.5 The author reiterates that the judge of the Superior Court declined jurisdiction to stay the deportation because the Federal Court had refused to intervene. He argues that although the judge went on to analyse the case on the merits he should not have done so, having declined jurisdiction and that an appeal, had it not been moot, would have been limited to the question of whether he ought to have declined jurisdiction and not whether he had made a case that his rights under the Canadian Charter of Rights and Freedoms had been violated.

6.6 The author contests the State party's argument on incompatibility and States that the theory that *if* the author's crimes in Canada had gone unpunished a precedent would have been set whereby those subject to execution in one State could commit crimes with impunity in another State, is inherently flawed. On the contrary, the author argues that if death row inmates knew that they would be prosecuted for crimes in Canada this would encourage them to commit such crimes there in order to serve a prison sentence in Canada and prolong their life or indeed commit murder in Canada and stave off execution in the United States indefinitely. If the author had been "removed by way of extradition following apprehension in Canada in 1988, he would have had little in the way of arguments to put forth".

6.7 The author contests the State party's arguments on the merits. He confirms that he has no authority for the proposition that detention in Canada for crimes committed in Canada can constitute death row confinement as there is no such recorded instance. The author submits that the mental anguish that characterizes death row confinement began with his apprehension in Canada in 1988 and "will only end upon his execution in the United States".

6.8 The author rejects as misinterpretation, the State party's point that the decision in *Pratt and Morgan*[11] is authority for the proposition that a prisoner cannot complain where delay is due to his own fault such as an "escape from custody". He concedes that the period when he was at large is not computed as part of the delay but this period began from the point of apprehension by the Canadian authorities. He further submits that he was not detained in Canada because of his escape but rather because he was prosecuted and convicted of robbery.

6.9 On the State party's reference to the conditions of detention in the Special Handling Unit, the author submits that this is the only super-maximum facility of its kind in Canada, and that he was subjected to "abhorrent living conditions". He also submits that the National Parole Board's decision to hold him for the full 10 years of his sentence and the subsequent annual reviews maintaining this decision constituted a form of reprieve, albeit temporary, from his return to the

United States where he was to be executed. In this regard, the author refers to the discussion of this issue in Pratt and Morgan (Privy Council), where Lord Griffith commented on the anguish attendant upon condemned prisoners who move from impending execution to reprieve.

6.10 The author argues that to remove him to a jurisdiction which limits his right to appeal violates article 14, paragraph 5, of the Covenant, and submits that article 6 of the Covenant should be read together with article 14, paragraph 5. On the issue of the Supreme Court of Pennsylvania's review of his case, the author maintains that the Court refused to entertain any claims of error at trial and, therefore, reviewed the evidence and decided to uphold the conviction and sentence. Issues such as the propriety of jury instructions are excluded from this type of review.

6.11 Without wishing the Committee to consider the transcripts of the murder trial, the author also refers to alleged errors that occurred during the course of his trial that could have changed the outcome of the case. He refers to a question from the jury which sought to clarify the difference between first- and third-degree murder and manslaughter. The jury's request was not answered, as the author's attorney could not be located. When the attorney appeared the next day, the jury was ready to deliver a verdict without receiving an answer to the request for clarification. A verdict of first degree murder was then returned.

6.12 The author submits that while a mechanism allowing limited review might be viewed as acceptable in cases in which non-capital crimes have been committed, he contends that this is wholly unacceptable where the defendant's life hangs in the balance, and when he is barred from having any claim of error at trial reviewed.

6.13 On the possibility of seeking relief under the PCRA, the author confirms that he did indeed seek relief by filing such a motion after he was deported to the United States. This motion was dismissed on 21 July 1999, and by reference to the previous case of *Commonwealth v. Kindler*, it was argued that the author's fugitive status had disqualified him from seeking such relief. The author further submits that as his application for relief under the PCRA was dismissed, he cannot seek federal habeas corpus relief, as PCRA relief was refused on the basis of the failure to respect a State statute.

6.14 On the possibility of a request to the Governor of Pennsylvania to seek commutation of his sentence to life, the author argues that the Governor is an elected politician who has no mandate to engage in an independent, neutral review of judicial decisions. It is submitted that his/her function in this respect "does not satisfy the requirements of articles 14 (5) and 6 of the Covenant".

Committee's consideration of admissibility

7.1 At its seventy-fifth session, the Committee considered the admissibility of the communication. It ascertained that the same matter was not being examined under another international procedure of international investigation or settlement.

7.3 As regards the author's complaint relating to prison conditions in Canada, the Committee found that the author had not substantiated this claim, for purposes of admissibility.

7.4 On the issue of an alleged violation of articles 7 and 10 of the Covenant in connection with the author's detention in Canada with the prospect of capital punishment awaiting him in the United States upon serving his term of imprisonment in Canada, the Committee noted that the author was not confined to death row in Canada, but serving a 10-year sentence for robbery. Consequently, he had failed to raise an issue under articles 7 and 10 in this respect and this part of the communication was found to be inadmissible under articles 2 and 3 of the Optional Protocol.

7.5 As to the alleged violation of article 6 for *detaining* the author in Canada for crimes committed therein, the Committee considered that he had not substantiated, for purposes of admissibility, how his right to life was violated by his *detention* in Canada for crimes committed there. This aspect of the communication was declared inadmissible under article 2 of the Optional Protocol.

7.6 The State party had argued that the author could not avail himself of the Optional Protocol to complain about his *deportation to the United States*, as he had not appealed his request for a stay of the deportation order from the Superior Court of Quebec to the Court of Appeal and therefore had not exhausted domestic remedies. The Committee observed the author's response, that an appeal would have been ineffective as the Court of Appeal would only have dealt with the issue of jurisdiction and not with the merits of the case, and that the State party removed the author within hours of the Superior Court's decision, thereby rendering an attempt to appeal this decision moot. The Committee noted that the State party had not contested the speed with which the author was deported, after the decision of the Superior Court and, therefore, irrespective of whether the author could have appealed his case on the merits, found that it would be unreasonable to expect the author to appeal such a case after his deportation, the very act which was claimed to violate the Covenant. Accordingly, the Committee did not accept the State party's argument that this part of the communication was inadmissible for failure to exhaust domestic remedies.

7.7 As regards the author's claim under article 14, paragraph 5, of the Covenant, and that Canada violated article 6 by deporting him, the Committee observed that the author had the *right* under Pennsylvanian law to a full appeal against his conviction and sentence. Furthermore, the Committee noted that, according to the documents provided by the parties, while the extent of the appeal was limited after the author had become a fugitive, his conviction and sentence were reviewed by the Supreme Court of Pennsylvania, which has a statutory obligation to review all death penalty cases. According to these documents, the author was represented by counsel and the Court reviewed the evidence and law as well as the elements required to sustain a first-degree murder conviction and capital punishment. In these particular circumstances, the Committee found that the author had not substantiated, for purposes of admissibility, his claim that his right under article 14, paragraph 5, was violated and that, therefore, his deportation from Canada entailed a violation by Canada of article 6 of the Covenant.

7.8 Notwithstanding its decision that the claim based on article 14, paragraph 5, was inadmissible, the Committee considered that the facts before it raised two issues under the Covenant that were admissible and should be considered on the merits:

> 1. As Canada has abolished the death penalty, did it violate the author's right to life under article 6, his right not to be subjected to torture or to cruel, inhuman or degrading

treatment or punishment under article 7, or his right to an effective remedy under article 2, paragraph 3, of the Covenant by deporting him to a State in which he was under sentence of death without ensuring that that sentence would not be carried out?

2. The State party had conceded that the author was deported to the United States before he could exercise his right to appeal the rejection of his application for a stay of his deportation before the Quebec Court of Appeal. As a consequence the author was not able to pursue any further remedies that might be available. By deporting the author to a State in which he was under sentence of death before he could exercise all his rights to challenge that deportation, did the State party violate his rights under articles 6, 7 and 2 of the Covenant?

The Committee concluded that, given the seriousness of these questions, the parties should be afforded the opportunity to comment on them before the Committee expressed its Views on the merits. The parties were requested to provide information on the current procedural situation of the author in the United States and on any prospective appeals he might be able to pursue. The State party was requested to supplement its submissions in relation to the above questions and request for information as soon as possible, but in any event within three months of the date of transmittal of the admissibility decision. Any Statements received from the State party were to be communicated to the author, who would be requested to respond within two months.

The State party's response on the merits pursuant to the Committee's request

8.1 By note verbale of 15 November 2002, the State party responded to the questions and request for further information by the Committee.

1. Whether Canada violated the Covenant by failing to seek assurances that the death penalty would not be carried out

8.2 The State party refers to article 6, paragraph 1, which declares that every human being has the right to life and guarantees that no one shall be arbitrarily deprived of his or her life. It submits that with respect to the imposition of the death penalty, article 6, paragraph 2, specifically permits its application in those countries which have not abolished it, but requires that it be imposed in a manner that respects the conditions outlined in article 6.

8.3 Article 6 does not explicitly refer to the situation where someone is extradited or removed to another State where that person is subject to the imposition of the death penalty. However, the State party notes that the Committee has held that "if a State party takes a decision relating to a person within its jurisdiction and the necessary and foreseeable consequence is that that person's rights under the *Covenant* will be violated in another jurisdiction, the State party itself may be in violation of the Covenant".[12] The Committee has thus found that article 6 applies to the situation where a State party seeks to extradite or remove an individual to a State where he/she faces the death penalty.

8.4 Article 6 allows States parties to extradite or remove an individual to a State where they face the death penalty as long as the conditions respecting the imposition of the death penalty in article 6 are met. The State party argues that the Committee, in the instant case, does not seem to question whether the imposition of the death penalty in the United States meets the conditions prescribed in article 6.[13] Rather, the Committee asked whether Canada violated the Covenant by failing to seek assurances that the death penalty would not be carried out against the author.

8.5 According to the State party, article 6 and the Committee's general comment No. 14 on article 6[14] are silent on the issue of seeking assurances, and no legal authority supports the proposition that abolitionist States must seek assurances as a matter of international law. The State party submits that to subsume such a requirement under article 6 would represent a significant departure from accepted rules of treaty interpretation, including the principle that a treaty should be interpreted in light of the intention of the States parties as reflected in the terms of the treaty.[15]

8.6 The State party recalls that the Committee has considered several communications respecting the extradition or removal of individuals from Canada to States where they face the death penalty. In none of these cases did the Committee raise concerns about the absence of seeking assurances. Furthermore, the State party observes that, the Committee has on previous occasions rejected the proposition that an abolitionist State that has ratified the Covenant is necessarily required to refuse extradition or to seek assurances that the death penalty would not be applied. In *Kindler v. Canada*,[16] the Human Rights Committee asked, "Did the fact that Canada had abolished capital punishment … require Canada to refuse extradition or request assurances from the United States … that the death penalty would not be imposed against Mr. Kindler." The State party notes the Committee's Statement in this regard that it "does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances". These comments were repeated in the Committee's Views in *Ng v. Canada*[17] and *Cox v. Canada*.[18]

8.7 As to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty pursuant to which States parties are required to take all necessary measures to abolish the death penalty within their jurisdictions, the State party refers to the Committee's finding that for States parties to the Second Optional Protocol, its provisions are considered as additional provisions to the Covenant and in particular article 6.[19] It submits that the instrument is silent on the issue of extradition or removal to face the death penalty, including whether assurances are required. The State party expresses no view on whether this instrument can be interpreted as imposing a requirement that assurances be sought, but emphasizes that it is not currently a party to the Second Optional Protocol. Therefore, its actions may only be scrutinized under the provisions of the Covenant.

8.8 The State party argues that at the time of the author's removal, 7 August 1998, there was no domestic legal requirement that Canada was required to seek assurances from the United States that the death penalty would not be carried out against him. While the Supreme Court of Canada had not ruled on this issue in the immigration context, they had dealt with it in relation to extradition, finding, in the cases of *Kindler v. Canada (Minister of Justice)*,[20] and *Reference Re Ng Extradition*,[21] that providing the Minister with discretion as to whether to seek assurances that the death penalty would not be carried out and the decision to extradite Kindler and Ng without seeking assurances did not violate the Canadian Constitution.[22]

8.9 It further argues that a State party's conduct must be assessed in light of the law applicable at the time when the alleged treaty violation took place: at the time of the author's removal there was no international legal requirement requiring Canada to seek assurances that the death penalty would not be carried out against Roger Judge. It submits that this is evidenced by the Committee's interpretation of the Covenant in *Kindler*, *Ng* and *Cox* (*supra*). In addition, the United Nation's Model Treaty on Extradition[23] does not list the absence of assurances that the death penalty will not be carried out as a "mandatory ground for refusal" to extradite an individual but it is listed as an "optional ground for refusal". Finally, it submits that whether abolitionist States should be required to seek assurances in all cases when removing individuals to countries where they face the death penalty is a matter of State policy but not a legal requirement under the Covenant.

8.10 On the question of whether removing the author to a State where he was under a sentence of death without seeking assurances violates article 7 of the Covenant, the State party submits that the Committee has held that extradition or removal to face capital punishment, within the parameters of article 6, paragraph 2, does not per se violate article 7.[24] It also notes the Committee's finding that there may be issues that arise under article 7 in connection with the death penalty depending on the "personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent".[25]

8.11 The State party argues that, in the instant case, the Committee rejected as inadmissible any claims respecting the author's personal factors, conditions of detention on death row or the method of execution. The only issue that is raised is whether Canada's failure to seek assurances that the death penalty will not be applied violates the author's rights under article 7. The State party argues that if the imposition of the death penalty within the parameters of article 6, paragraph 2, does not violate article 7, then the failure of a State to seek assurances that the death penalty will not be applied cannot violate article 7. To hold otherwise would mean that the imposition of the death penalty within the parameters of article 6, paragraph 2, by State X, would not constitute torture, cruel, inhuman or degrading treatment or punishment, but that a State which extradites to State X without seeking assurances that the death penalty would not be applied, would be found to have placed the individual at a real risk of torture, cruel, inhuman or degrading treatment or punishment. In the State party's view, this amounts to an untenable interpretation of article 7. For these reasons, the State party asserts that it is not in violation of article 7 for having removed Roger Judge to the United States without seeking assurances.

8.12 The State party submits that article 2, paragraph 3, of the Covenant requires States parties to ensure that any person whose rights or freedoms have been violated under the Covenant, have an effective remedy, that claims of rights violations can be heard before competent authorities and that any remedies be enforced. The State party relies on its submissions on articles 6 and 7 and asserts in light of those arguments, that it did not violate the author's rights or freedoms under the Covenant. Canada's obligations under article 2, paragraphs 3 (a) and (c), thus do not arise in this case.

8.13 Furthermore, the State party submits that individuals who claim violations of their rights and freedoms, can have such claims determined by competent judicial authorities and if such claims are substantiated, be provided an effective remedy. More particularly, it argues, that the issue of whether it was required to seek assurances that the death penalty not be applied to the author could have been raised before domestic courts.[26]

2. Did the removal of the author to a State in which he was under sentence of death before he could exercise all his rights to challenge that removal violate the author's rights under articles 6, 7 and 2 of the Covenant?

8.14 The State party relies, mutatis mutandis, on its previous submissions with respect to the first question posed by the Committee. In particular, its argument that article 6 and the Committee's relevant general comment[27] are silent on the issue of whether a State is required to allow an individual to exercise all rights of appeal prior to removing them to a State where they have been sentenced to death. No legal authority has been found for this proposition and finding such a requirement under article 6 would represent a significant departure from accepted rules of treaty interpretation. In the State party's view, articles 6, paragraph 4, and 14, paragraph 5, provide important safeguards for the State party seeking to impose the death penalty[28] but do not apply to a State party that removes or extradites an individual to a State where they have been sentenced to death.

8.15 The State party explains that section 48 of the Immigration Act[29] stipulates that a removal order must be executed as soon as reasonably practicable subject to statutory or judicial stays. That is, where there are no stays on its execution, a removal order is a mandatory one which the Minister is legally bound to execute as soon as reasonably practicable, having little discretion in this regard. In the present case, the State party submits that, none of the statutory stays available under sections 49 and 50 of the Immigration Act applied to the author, and his requests for a judicial stay were dismissed by the reviewing courts.

8.16 The State party argues that the application for leave to commence an application for judicial review of the Minister's response that he was unable to defer removal including a lengthy memorandum of argument was considered by the Federal Court and denied. Similarly, the Superior Court of Quebec considered the author's petition for the same relief dismissing it for both procedural and substantive reasons. Neither court found sufficient reason to stay removal. If the State party were to grant stays on removal orders until all levels of appeal could be exhausted, it argues that this would mean that individuals, such as the author, who committed serious crimes, would remain in Canada for significantly longer periods, which would result in lengthy delays on removals with no guarantee that serious criminals, such as the author, could be held in detention throughout the appeal process.[30]

8.17 On whether there has been a violation of article 7 in this regard, the State party relies, mutatis mutandis, on its previous submissions with respect to the first question posed by the Committee. In particular, if the imposition of the death penalty within the parameters of article 6, paragraph 2, does not violate article 7, then the failure of a State to allow an individual the possibility of exercising all judicial recourses prior to removal to the State imposing the death penalty cannot be a violation of article 7. The State party argues that the crucial issue is whether a State party imposing the death penalty has met the standards set out in article 6 and other relevant provisions of the Covenant and not whether the State party removing an individual to a State where he is under sentence of death has provided that individual with sufficient opportunity for judicial review of the decision to remove.

8.18 With respect to article 2, paragraph 3, of the Covenant, the State party submits that it has not violated any of the author's Covenant rights as he enjoyed sufficient judicial review of his removal order, prior to his removal to the United States, including review of whether the removal would violate his human rights.

8.19 On the author's current situation in the United States, the State party submits that it has been informed by the Philadelphia District Attorney's Office, State of Pennsylvania that the author is currently incarcerated in a State penitentiary, and that no execution date has been set for him.

8.20 On 23 May 2002, the Supreme Court of Pennsylvania denied the author's application for post conviction relief. The author has recently filed a petition for habeas corpus in the Federal District Court. An adverse decision rendered by the District Court can be appealed to the Federal Court of Appeals for the Third Circuit. This may be followed by an appeal to the United States Supreme Court. If the author's federal appeals are denied, an application for clemency can be filed with the State Governor. In addition, the State party reiterates that, according to the State of Pennsylvania, there have only been three persons executed since the reintroduction of the death penalty in 1976.

8.21 Without prejudice to any of the preceding submissions, the State party apprises the Committee of domestic developments that have occurred since the events at issue in this case. On 15 February 2001, the Supreme Court of Canada held, in *United States v. Burns*,[31] that the Government must seek assurances, in all but exceptional cases, that the death penalty would not be applied prior to extraditing an individual to a State where they face capital punishment. The State party submits that Citizenship and Immigration Canada is considering the potential impact of this decision on immigration removals.

The author's response on the merits pursuant to the Committee's request

9.1 By letter of 24 January 2003, the author responded to the request for information by the Committee and commented on the State party's submission. He submits that by relying on the decision in *Kindler v. Canada*,[32] in its argument that in matters of extradition or removal, the Covenant is not necessarily breached by an abolitionist State where assurances that the death penalty not be carried out are not requested, the State party has misconstrued not only the facts of *Kindler* but the effect of the Committee's decision therein.

9.2 Firstly, the author argues that *Kindler* dealt with extradition as opposed to deportation. He recalls the Committee's Statement that there would have been a violation of the Covenant "if the decision to extradite without assurances would have been taken arbitrarily or summarily". However, since the Minister of Justice considered Mr. Kindler's arguments prior to ordering his surrender without assurances, the Committee could not find that the decision was made "arbitrarily or summarily". The case currently under consideration concerns deportation, which lacks any legal process under which the deportee may request assurances that the death penalty not be carried out.

9.3 Secondly, the author reiterates that he petitioned the Canadian courts to declare that his removal by deportation would violate his rights under the Canadian Charter of Rights and Freedoms, so as to suspend his removal from Canada and "force" the United States to request his extradition, at which point he could have requested the Minister of Justice to seek assurances that the death penalty not be carried out. As the Minister of Justice has no such power under the deportation process, the State party was able to exclude the author from the protections afforded by the extradition treaty and no review of the appropriateness of requesting assurances was ever carried out. The author submits that the United States would have requested his extradition and encloses a letter, dated 3 February 1994, from the Philadelphia District Attorney's Office, exhibited with the author's proceedings in Canada, indicating that it will initiate extradition proceedings if necessary. Any refusal by the Minister to require assurances could then have been reviewed through the domestic court system. In "sidestepping" the extradition process and returning the author to face the death penalty, the State party is said to have violated the author's rights under articles 6, 7, and 2 (3) of the Covenant, as unlike *Kindler*, it did not consider the merits of assurances.

9.4 As to whether the State party violated his rights by deporting him before he could exercise all his rights to challenge his deportation, the author submits that the State party's interpretation of its obligations are too restrictive and that death penalty cases require special consideration. By removing him within hours after the Superior Court of Quebec's decision (handed down late evening), it is argued that the State party ensured that the civil rights issues raised by the author could not benefit from any appellate review.

9.5 The author argues that this restrictive approach is contrary to the wording of the general comment on article 2 which States "... The Committee considers it necessary to draw the attention of State parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that State parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction". By deporting the author to ensure that he could not avail himself of his right of appeal, not only did the State party violate article 2, paragraph 3, of the Covenant, but the spirit of this general comment.

9.6 The author submits that the Minister has some discretion, under section 48 of the Immigration Act and is not under an obligation to remove him "immediately". Also, domestic jurisprudence recognizes that the Minister has a duty to exercise this discretion on a case-by-case basis. He refers to the case of *Wang v. The Minister of Citizenship and Immigration*,[33] where it was held that "the discretion to be exercised is whether or not to defer to another process which may render the removal order ineffective or unenforceable, the object of that process being to determine whether removal of that person would expose him to a risk of death or other extreme sanction". According to this principle, the author believes that he should not have been deported until he had had an opportunity to avail himself of appellate review. It is submitted that had his right to appeal not been curtailed by his deportation, his case would still have been in the Canadian judicial system when the Supreme Court of Canada determined, in *United States of America v. Burns*,[34] that except in exceptional cases, assurances must be requested in all cases in which the death penalty could otherwise be imposed, and he would have benefited from it.

9.7 On the State party's argument (para. 8.13) that "the issue of whether Canada was required to seek assurances that the death penalty not be applied to Roger Judge could have been raised before domestic courts", the author submits that the State party misconstrued his legal position. The author's proceedings in Canada were intended to result in a stay of his deportation, so as to compel the United States to seek extradition, and only at this point could the issue of assurances have been raised.

9.8 On the author's current legal position, it is contested that no execution date has been set. It is submitted that a Death Warrant was signed by the Governor on 22 October 2002, and his execution scheduled for 10 December 2002. However, his execution has since been stayed, pending habeas corpus proceedings before the Federal District Court.

Issues and proceedings before the Committee

10.1 The Human Rights Committee has examined the communication in light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

> Question 1. As Canada has abolished the death penalty, did it violate the author's right to life under article 6, his right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment under article 7, or his right to an effective remedy under article 2, paragraph 3, of the Covenant by deporting him to a State in which he was under sentence of death without ensuring that that sentence would not be carried out?

10.2 In considering Canada's obligations, as a State party which has abolished the death penalty, in removing persons to another country where they are under sentence of death, the Committee recalls its previous jurisprudence in *Kindler v. Canada*,[35] that it does not consider that the deportation of a person from a country which has abolished the death penalty to a country where he/she is under sentence of death amounts per se to a violation of article 6 of the Covenant. The Committee's rationale in this decision was based on an interpretation of the Covenant which read article 6, paragraph 1, together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. It considered that as Canada itself had not imposed the death penalty but had extradited the author to the United States to face capital punishment, a State which had not abolished the death penalty, the extradition itself would not amount to a violation by Canada unless there was a real risk that the author's rights under the Covenant would be violated in the United States. On the issue of assurances, the Committee found that the terms of article 6 did not necessarily require Canada to refuse to extradite or to seek assurances but that such a request should at least be considered by the removing State.

10.3 While recognizing that the Committee should ensure both consistency and coherence of its jurisprudence, it notes that there may be exceptional situations in which a review of the scope of application of the rights protected in the Covenant is required, such as where an alleged violation involves that most fundamental of rights - the right to life - and in particular if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised. The Committee is mindful of the fact that the above-mentioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in States which have retained the death penalty, a broadening consensus not to carry it out. Significantly, the Committee notes that since *Kindler* the State party itself has recognized the need to amend its own domestic law to secure the protection of those extradited from Canada under sentence of death in the receiving State, in the case of *United States v. Burns*. There, the Supreme Court of Canada held that the Government *must* seek assurances, in all but exceptional cases, that the death penalty will not be applied prior to extraditing an individual to a State where he/she faces capital punishment. It is pertinent to note that under the terms of this judgement, "Other abolitionist countries do not, in general, extradite without assurances."[36] The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.

10.4 In reviewing its application of article 6, the Committee notes that, as required by the Vienna Convention on the Law of Treaties, a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Paragraph 1 of article 6, which States that "Every human being has the inherent right to life ...", is a general rule: its purpose is to protect life. States parties that have abolished the death penalty have an obligation under this paragraph to so protect in all circumstances. Paragraphs 2 to 6 of article 6 are evidently included to avoid a reading of the first paragraph of article 6, according to which that paragraph could be understood as abolishing the death penalty as such. This construction of the article is reinforced by the opening words of paragraph 2 ("In countries which have not abolished the death penalty ...") and by paragraph 6 ("Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."). In effect, paragraphs 2 to 6 have the dual function of creating an exception to the right to life in respect of the death penalty and laying down limits on the scope of that exception. Only the death penalty pronounced when certain elements are present can benefit from the exception. Among these limitations are that found in the opening words of paragraph 2, namely, that only States parties that "have not abolished the death penalty" can avail themselves of the exceptions created in paragraphs 2 to 6. For countries that *have* abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.

10.5 The Committee acknowledges that by interpreting paragraphs 1 and 2 of article 6 in this way, abolitionist and retentionist States parties are treated differently. But it considers that this is an inevitable consequence of the wording of the provision itself, which, as becomes clear from the *Travaux Préparatoires*, sought to appease very divergent views on the issue of the death penalty, in an effort at compromise among the drafters of the provision. The Committee notes that it was expressed in the *Travaux* that, on the one hand, one of the main principles of the Covenant should be abolition, but on the other, it was pointed out that capital punishment existed in certain countries and that abolition would create difficulties for such countries. The death penalty was seen by many delegates and bodies participating in the drafting process as an "anomaly" or a "necessary evil". It would appear logical, therefore, to interpret the rule in article 6, paragraph 1, in a wide sense, whereas paragraph 2, which addresses the death penalty, should be interpreted narrowly.

10.6 For these reasons, the Committee considers that Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty, violated the author's right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out. The Committee recognizes that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution of the author.

10.7 As to the State party's claim that its conduct must be assessed in the light of the law applicable at the time when the alleged treaty violation took place, the Committee considers that the protection of human rights evolves and that the meaning of Covenant rights should in principle be interpreted by reference to the time of examination and not, as the State party has submitted, by reference to the time the alleged violation took place. The Committee also notes that prior to the author's deportation to the United States the Committee's position was evolving in respect of a State party that had abolished capital punishment (and was a State party to the Second Optional Protocol to the International Covenant on Human Rights, aiming at the abolition of the death penalty), from whether capital punishment would subsequent to removal to another State be applied in violation of the Covenant to whether there was a real risk of capital punishment as such (communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997 and communication No. 706/1996, *G.T. v. Australia*, Views adopted on 4 November 1997). Furthermore, the State party's concern regarding possible retroactivity involved in the present approach has no bearing on the separate issues to be addressed under question 2 below.

> Question 2. The State party had conceded that the author was deported to the United States before he could exercise his right to appeal the rejection of his application for a stay of his deportation before the Quebec Court of Appeal. As a consequence the author was not able to pursue any further remedies that might be available. By deporting the author to a State in which he was under sentence of death before he could exercise all his rights to challenge that deportation, did the State party violate his rights under articles 6, 7 and 2, paragraph 3 of the Covenant?

10.8 As to whether the State party violated the author's rights under articles 6, and 2, paragraph 3, by deporting him to the United States where he is under sentence of death, before he could exercise his right to appeal the rejection of his application for a stay of deportation before the Quebec Court of Appeal and, accordingly, could not pursue further available remedies, the Committee notes that the State party removed the author from its jurisdiction within hours after the decision of the Superior Court of Quebec, in what appears to have been an attempt to prevent him from exercising his right of appeal to the Court of Appeal. It is unclear from the submissions before the Committee to what extent the Court of Appeal could have examined the author's case, but the State party itself concedes that as the author's petition was dismissed by the Superior Court for procedural and substantive reasons (see paragraph 4.5 above), the Court of Appeal could have reviewed the judgement on the merits.

10.9 The Committee recalls its decision in *A.R.J. v. Australia*,[37] a deportation case where it did not find a violation of article 6 by the returning State as it was not foreseeable that he would be sentenced to death and "because the judicial and immigration instances seized of the case heard extensive arguments" as to a possible violation of article 6. In the instant case, the Committee finds that, by preventing the author from exercising an appeal available to him under domestic law, the State party failed to demonstrate that the author's contention that his deportation to a country where he faces execution would violate his right to life, was sufficiently considered. The State party makes available an appellate system designed to safeguard any petitioner's, including the author's, rights and in particular the most fundamental of rights - the right to life. Bearing in mind that the State party has abolished capital punishment, the decision to deport the author to a State where he is under sentence of death without affording him the opportunity to avail himself of an available appeal, was taken arbitrarily and in violation of article 6, together with article 2, paragraph 3, of the Covenant.

10.10. Having found a violation of article 6, paragraph 1 alone and, read together with article 2, paragraph 3 of the Covenant, the Committee does not consider it necessary to address whether the same facts amount to a violation of article 7 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Canada of articles 6, paragraph 1 alone and, read together with 2, paragraph 3, of the International Covenant on Civil and Political Rights.

12. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy which would include making such representations as are possible to the receiving State to prevent the carrying out of the death penalty on the author.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The Committee is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present document.]

Notes

[1] The author states that the mode of execution was subsequently changed to execution by lethal injection.

[2] As later explained by the State party, pursuant to the Corrections and Conditional Release Act, a prisoner in Canada is entitled to be released after having served two thirds of his sentence (i.e. the statutory release date). However, the Correctional Services of Canada reviews each case, through the National Parole Board, to determine whether, if released on the statutory release date, there are reasonable grounds to believe that the released prisoner would commit an offence causing death or serious harm. Correctional Services of Canada did so find with respect to the author.

[3] As later explained by the State party and evidenced in the documentation provided, the Minister informed the author that there was no provision under sections 49 and 50 of the Immigration Act to defer removal pending receipt of an extradition request or order. However, in the event that an extradition request was received by the Minister of Justice, the removal order would be deferred pursuant to paragraph 50 (1) (a) of the Immigration Act. An extradition request was never received.

[4] The State party refers to the following cases *Pratt and Morgan v. Jamaica, Communication Nos. 210/1986, 225/1987, Barrett and Sutcliffe v. Jamaica, Communication Nos. 270/1988, 271/1988, Kindler v. Canada, Communication No. 470/1990, Views adopted on 30 July 1993, Johnson v. Jamaica, Communication No. 588/1994 and Francis v. Jamaica, Communication No. 606/1994.*

[5] The State party refers to *Pratt and Morgan*, supra, *Wallen and Baptiste (No. 2) (1994), 45 W.I.R. 405 at 436 (C.A., Trinidad and Tobago).*

[6] *Kindler*, supra.

[7] *Reid v. Jamaica, Communication No. 250/1987.*

[8] *McTaggart v. Jamaica, Communication No. 749/1997.*

[9] The State party refers to M. Nowak, United Nations Covenant on Civil and Political Rights: CCPR Commentary (Strasbourg: N.P. Engel, Publisher, 1993) at 266.

[10] The State party refers to *Commonwealth of Pennsylvania v. Deemer, 705 A. 2d 627 (Pa. 1997).*

[11] *Pratt and Morgan v. Jamaica*, supra.

[12] *Kindler v. Canada*, supra, *Ng v. Canada*, Communication No. 469/1991, Views adopted on 5 November 1993, *Cox v. Canada*, Communication No. 539/1993, Views adopted on 31 October 1994, *G.T. v. Australia*, Communication No. 706/1996, Views adopted on 4 November 1997.

[13] According to the State party, with respect to the conditions under which the death penalty is applied in the State of Pennsylvania, the Committee found in paragraph 7.7 of its decision on admissibility that the author had the right under Pennsylvanian law to a full appeal against his conviction and sentence and that the conviction and sentence were reviewed by the Supreme Court of Pennsylvania. The Committee held that the author's claim based on article 14, paragraph 5 was inadmissible.

[14] HRI/GEN/1/Rev.6.

[15] The State party refers to article 31 of the Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969) which States that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object a/nd purpose". Article 31 requires that the ordinary meaning of the terms of a provision of the treaty be the primary source for interpreting its meaning. The context of a treaty for the purposes of interpreting its provisions includes any subsequent agreement or practise of States parties that confer an additional meaning to the provision (art. 31, paras. 2 and 3).

[16] Supra.

[17] Supra.

[18] Supra.

[19] *G.T. v. Australia*, supra.

[20] [1991] 2 S.C.R. 779.

[21] [1991] 2 S.C.R. 858.

[22] Ibid., at p. 840.

[23] UN Doc. A/RES/45/116, adopted 14 December 1990.

[24] *Kindler v. Canada*, supra.

[25] *Kindler v. Canada*, supra.

[26] The State party refers to Canadian Charter of Rights and Freedoms, s.24 (1) which, in a similar manner to the Covenant, protects individuals' right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" (s. 7) and the right "not to be subjected to any cruel and unusual treatment or punishment" (s. 12). Anyone who claims that his or her rights or freedoms have been infringed may apply to a competent court to obtain such remedy as the court considers just and appropriate in the circumstances.

[27] Supra.

[28] In the instant case, the Committee found that the author's claim of a violation of a right to an appeal under article 14, paragraph 5, of the Covenant was not substantiated for the purposes of the admissibility of the communication (at para. 7.7).

[29] This provision has been repealed and replaced by a similar provision in the Immigration and Refugee Protection Act.

[30] The State party further explains that under the former Immigration Act and the new Immigration and Refugee Protection Act, the Minister could argue in favour of detention during the appeal process based on the grounds that the person was likely to pose a danger to the public, or unlikely to appear for removal. The reasons for detention would be reviewed by an independent decision-maker. The Minister however, would not be able to guarantee the continued detention of the person and the longer the period of detention, the more likely that the individual would be released into the public.

[31] Neutral citation 2001 SCC 7. [2001] S.C.J No. 8.

[32] Supra.

[33] [2001] FCT 148 (6 March 2001).

[34] Supra.

[35] Supra.

[36] Supra.

[37] Supra.

Individual opinion by Committee member Mr. Nisuke Ando concerning Committee's admissibility decision on communication No. 829/1998 (*Judge v. Canada*) adopted on 17 July 2002

With regret, I must point out that I am unable to share the Committee's conclusion set forth in paragraph 7.8 in which it draws attention of both the author and the State party and requests them to address the two issues mentioned therein which relate to articles 6, 7 and 2 of the Covenant.

In its decision on admissibility of the communication the Committee makes clear that the communication is inadmissible as far as it relates to issues under articles 7, 10 (para. 7.4), article 6 (para. 7.5) and article 14 (5) (para. 7.7), and yet the Committee concludes that the facts presented by the author raise the two issues mentioned above. It is my understanding that in the present communication both the author and the State party have presented their cases in view of the Committee's earlier jurisprudence on Case No. 470/1991 (*J. Kindler v. Canada*), because in those two communications the relevant facts are very similar or almost identical. The Committee's line of argument in the present communication also suggests this. Under the circumstances I consider it illogical for the Committee to state that the communication is inadmissible in matters relating to articles 7, 10, 6 and 14 (5), on the one hand, but that it raises issues under articles 6, 7 and 2, on the other, unless it specifies how these apparent contradictions are to be solved. A mere reference to "the seriousness of these questions" (para. 7.8) does not suffice: Hence, this individual opinion!

(*Signed*): Nisuke Ando

Individual opinion submitted by Ms. Christine Chanet concerning Committee's admissibility decision on communication No. 829/1998 (*Judge v. Canada*) adopted on 17 July 2002

Unlike its position in the case of *Kindler v. Canada*, in this case the Committee directly addresses the fundamental question of whether Canada, having abolished the death penalty, violated the author's right to life under article 6 of the Covenant by extraditing him to a State where he faced capital punishment, without ascertaining that that sentence would not in fact be carried out.

I can only subscribe to this approach, which I advocated and had wished to see applied in the Kindler case; indeed, that was the basis of the individual opinion I submitted in that case.

In my view, asking that question obviates the need for a response such as the Committee gives in this case concerning a violation by Canada of article 14, paragraph 5, of the Covenant.

The position adopted by the Committee on this point implies that it declares itself competent to consider the author's arguments concerning a possible violation of article 14, paragraph 5, of the Covenant, as a result of irregularities in the proceedings taken against the author in the United States, a position identical to that adopted in the Kindler case (para. 14.3).

In my view, while the Committee can declare itself competent to assess the degree of risk to life (death sentence) or to physical integrity (torture), it is less obvious that it can base an opinion that a violation has occurred in a State party to the Covenant on a third State's failure to observe a provision of the Covenant.

Taking the opposite position would amount to requiring a State party that called into question respect for human rights in its relations with a third State to be answerable for respect by that third State for all rights guaranteed by the Covenant vis-à-vis the person concerned.

And why not? It would certainly be a step forward in the realization of human rights, but legal and practical problems would immediately arise.

What is a third State, for example? What of States non-parties to the Covenant? What of a State that is party to the Covenant but does not participate in the procedure? Does the obligation of a State party to the Covenant in its relations with third States cover all the rights in the Covenant or only some of them? Could a State party to the Covenant enter a reservation to exclude implementation of the Covenant from its bilateral relations with another State?

Even setting aside the complex nature of the answers to these questions, applying the "maximalist" solution in practice is fraught with problems.

For while the Committee can ascertain that a State party has not taken any undue risks, and may perhaps give an opinion on the precautions taken by the State party to that end, it can never really be sure whether a third State has violated the rights guaranteed by the Covenant if that State is not a party to the procedure.

In my view, therefore, the Committee should in this case have refrained from giving an opinion with respect to article 14, paragraph 5, and should have awaited a reply from the State party on the fundamental issue of expulsion by an abolitionist State to a State where the expelled individual runs the risk of capital punishment, since the terms in which the problem of article 14, paragraph 5, is couched will vary depending whether the answer to the first question is affirmative or negative.

For if an abolitionist State cannot expel or extradite a person to a State where that person could be executed, the issue of the regularity of the procedure followed in that State becomes irrelevant.

If, on the other hand, the Committee maintains the position adopted in the *Kindler* case, it will need to make a thorough study of the problem of States parties' obligations under the Covenant in their relations with third States.

(*Signed*): Christine Chanet

Individual opinion by Committee member Mr. Hipólito Solari Yrigoyen concerning Committee's admissibility decision on communication No. 829/1998 (*Judge v. Canada*) adopted on 17 July 2002 (dissenting)

I disagree with regard to the present communication on the grounds set forth below:

The Committee is of the view that the author's counsel has substantiated for the purposes of admissibility, his allegation that the State party has violated his right to life under article 6 and article 14, paragraph 5, of the Covenant by deporting him to the United States, where he has been sentenced to death, and that his claim is compatible with the Covenant. The Committee therefore declares that this part of the communication is admissible and should be considered on the merits.

Committee's consideration of the merits

With regard to a potential violation by Canada of article 6 of the Covenant for having deported the author to face the imposition of the death penalty in the United States, the Committee refers to the criteria set forth in its prior jurisprudence. Namely, for States that have abolished capital punishment and that extradite a person to a country where that person may face the imposition of a death penalty, the extraditing State must ensure itself that the person is not exposed to a real risk of a violation of his rights under article 6 of the Covenant.[1]

The Committee notes that the State party's argument in the present communication, that several additional review recourses were available to the author, such as filing a petition in the Court of Common Pleas under Pennsylvania's Post-Conviction Relief Act, filing a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania, making a request to the Governor of Pennsylvania for clemency, and appealing to the Pennsylvania Supreme Court. The Committee observes that the automatic review of the author's sentence by the Pennsylvania Supreme Court took place in absentia, when the author was in prison in Canada. Although the author was represented by counsel, the Supreme Court did not undertake a full review of the case, nor did it review the sufficiency of evidence, possible errors at trial, or propriety of sentence. A review of this nature is not compatible with the right protected under article 14, paragraph 5, of the Covenant, which calls for a full evaluation of the evidence and the court proceedings. The Committee considers that such limitations in a capital case amount to a denial of a fair trial, which is not compatible with the right protected under article 14, paragraph 5, of the Covenant, and that the author's flight from the United States to avoid the death penalty does not absolve Canada from its obligations under the Covenant. In the light of the foregoing, the Committee considers the State party accountable for the violation of article 6 of the Covenant as a consequence of the violation of article 14, paragraph 5.

The Committee has noted the State party's argument that there was no law under which it could have detained the author on expiry of his sentence and therefore had to deport him. The Committee takes the view that this response is unsatisfactory for three reasons, namely:
(1) Canada deported the author knowing that he would not have the right to appeal in a capital

case; (2) the speed with which Canada deported the author did not allow him the opportunity to appeal the decision to remove him; and (3) in the present case, Canada took a unilateral decision and therefore cannot invoke its obligations under the Extradition Treaty with the United States, since at no time did the United States request the extradition.

The Committee, acting under article 5, paragraph 4, of the Optional Protocol finds that Canada has violated its obligations under article 2 of the Covenant to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant because, when it deported the author to the United States, it did not take sufficient precautions to ensure that his rights under article 6 and to article 14, paragraph 5, of the Covenant would be fully observed.

The Human Rights Committee requests the State party to do everything possible, as a matter of urgency to avoid the imposition of the death penalty or to provide the author with a full review of his conviction and sentence. The State party has the obligation to ensure that similar violations do not occur in the future.

Bearing in mind that by signing the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish these Views.

(*Signed*): Hipólito Solari Yrigoyen

Note

[1] Communication No. 692/1996, *A.R.J. v. Australia*; No. 706/1996, *T. v. Australia*; No. 470/1991, *Kindler v. Canada*; No. 469/1991, *Chitat Ng v. Canada* and No. 486/1992, *Cox v. Canada*.

Individual opinion of Committee member Mr. Rajsoomer Lallah (concurring)

I entirely agree with the Committee's revision of the approach which it had adopted in *Kindler v. Canada* in relation to the correct interpretation to be given to the "inherent right to life" guaranteed under article 6 (1) of the Covenant. This revised interpretation is well explicated in paragraphs 10.4 and 10.5 of the present Views of the Committee. I wish, however, to add three observations.

First, while it is encouraging to note, as the Committee does in paragraph 10.3 of the present Views, that there is a broadening international consensus in favour of the abolition of the death penalty, it is appropriate to recall that, even at the time when the Committee was considering its views in *Kindler* some 10 years ago, the Committee was quite divided as to the obligations which a State party undertakes under article 6 (1) of the Covenant, when faced with a decision as to whether to remove an individual from its territory to another State where that individual had been sentenced to death. No less than five members of the Committee dissented from the Committee's Views, precisely on the nature, operation and interpretation of article 6 (1) of the Covenant. The reasons which led those five members to dissent were individually expressed in separate individual opinions which are appended to this separate opinion as A, B, C, D and E. In the case of the separate opinion at E, only the fact that appears most relevant is reproduced (paras. 19 to 25).[1]

My second observation is that other provisions of the Covenant, in particular, articles 5 (2) and 26, may be relevant in interpreting article 6 (1), as noted in some of the individual opinions.

It is also encouraging that the Supreme Court of Canada has held that in similar cases assurances must, as the Committee notes, be obtained, subject to exceptions. I wonder to what extent these exceptions could conceptually be envisaged given the autonomy of article 6 (1) and the possible impact of article 5 (2) and also article 26 which governs the legislative, executive and judicial behaviour of States parties. That, however, is a bridge to be crossed by the Committee in an appropriate case.

(*Signed*): Rajsoomer Lallah

Note

[1] For the text of these individual opinions, please refer to communication No. 470/1991, *Kindler v. Canada* in Chapter XII, U of Annual Report A/48/40, Vol. II.

H. Communication No. 836/1998, *Gelazauskas v. Lithuania**
(Views adopted on 17 March 2003, seventy-seventh session)

Submitted by:	Kestutis Gelazauskas (represented by counsel Mr. K. Stungys)
Alleged victim:	The author
State party:	Lithuania
Date of communication:	14 April 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 March 2003,

Having concluded its consideration of communication No. 836/1998, submitted to the Human Rights Committee on behalf of Mr. Kestutis Gelazauskas under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 14 April 1997, is Mr. Kestutis Gelazauskas, a citizen of Lithuania and currently serving a prison term of 13 years in Pravieniskes penitentiary No. 2, Lithuania. He claims to be a victim of a violation by Lithuania of article 14, paragraphs 1, 3 (g) and 5 of the International Covenant on Civil and Political Rights (the Covenant). He is represented by counsel.

The facts as submitted by the author

2.1 On 4 May 1994, the author was sentenced, together with a co-defendant, to 13 years' imprisonment for the murder, on 20 March 1993, of Mr. Michailas Litvinenka. According to the judgement, the victim was murdered in his home by both defendants after they had been drinking together. The victim was found hidden in his sofa and had died, in the opinion of medical experts, by a combination of blows to his body and stabs to his eyes, heart and lungs. There were 27 injuries on the victim's body and an attempt to saw off his leg. Several witnesses alleged that they had been told by the defendants that both of them had killed the victim. Both defendants were found guilty as charged and were sentenced to the same period of imprisonment.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 Applications for cassation motions were made on behalf of the author on four occasions but a review of his case was always denied. On 28 September 1995, the author's mother made an application for cassation motion.[1] On the same day, the author's counsel made a similar application for cassation motion, which was rejected by the chairman of the Division of Criminal Cases of the Supreme Court on 8 December 1995. On 2 April 1996, the author's counsel made another application for cassation motion, which was also rejected by the chairman of the Supreme Court. Finally, on 15 April 1996, the author's counsel made a last application for cassation motion which was rejected on 12 June 1996.

The complaint

3.1 The author first alleges a violation of article 14, paragraph 5, of the Covenant on the grounds that he had no possibility to make an appeal against the judgement of 4 May 1994. In this case, the court of first instance was the Supreme Court and, under the State party's legislation, its judgements are not subject to appeal. Such a judgement may be reviewed by an application for cassation motion to the Supreme Court but a review of the judgement is dependent on the discretion of the chairman of the Supreme Court or of the Division of Criminal Cases of the Supreme Court. All attempts to bring such an application have failed.

3.2 The author also alleges a violation of article 14, paragraph 1, of the Covenant because the prosecution allegedly failed to prove that the author had a motive and an intention to commit the offence and the Court failed to refer to this aspect of the offence in the written judgement. According to the author, it was therefore unlawful to convict him of "premeditated murder".[2] The author also contends that the prosecution failed to prove a causal link between the blows allegedly struck by the author and the death of the victim. According to the author, the court failed to ascertain the actual cause of death. His conviction and the hearing would therefore be unfair.

3.3 Finally, the author alleges a violation of article 14, paragraph 3 (g), of the Covenant because he was forced to admit, during the preliminary investigation, that he had struck the victim twice. The author later testified that he had not struck the victim, that it was the co-defendant who stabbed him and that he had helped the co-defendant to dispose of the body. The author alleges that he was threatened, beaten and deceived into giving a confession by the investigator, Mr. Degsnys, and that his mother, who had an intimate relationship with the latter, was used as a means to secure this confession. According to the author, the investigator deceived his mother, by persuading her to write to the author and encourage him to admit to having struck the victim so as to avoid the death penalty.

The State party's observations on the admissibility and merits of the communication

4.1 By submissions of 21 December 1998, the State party made its observations on the admissibility and merits of the communication.

Alleged violation of article 14, paragraph 5, of the Covenant

4.2 On the alleged violation of article 14, paragraph 5, of the Covenant, the State party gives an explanation on the possibilities of appeal in the domestic procedure, because the system was reformed a few months after the author was convicted.

4.3 At the time of the sentence, a two-tier court system - local courts and the Supreme Court - was in force in the State party. Both courts could function as first instance courts and, in accordance with the Code of Criminal Procedure valid at that time, there were two types of appeal possible:

- Court sentences that were not yet in force could be appealed in cassation to the Supreme Court within seven days after the announcement of the sentence. Nevertheless, sentences of the Supreme Court taken in first instance were final and not susceptible to appeal in cassation.
- Sentences of local courts and of the Supreme Court could, after having come into force, be challenged by "supervisory protest" within one year of the coming into force. Only the Chairperson of the Supreme Court, the Prosecutor-General and their deputies had a right of submission of this "supervisory protest". A sentenced person or his counsel only had the right to address these persons with a request that they submit a "supervisory protest". If such a request was made, the "Presidium" of the Supreme Court would hear the case and decide whether to dismiss the protest, dismiss the criminal case and acquit the person, return the case to the first instance, or take another decision.

4.4 This procedure was applicable until 1 January 1995. Nevertheless, in the present case, neither the author, nor his counsel made a request for the submission of a "supervisory protest" after the sentence came into force for the author.

4.5 On 1 January 1995, several new laws reforming the domestic procedure came into force:

- The law of 31 May 1994 ("the new Law on Courts"), which came into force on 1 January 1995, replaced the two-tier court system by a four-tier court system (district and county courts, Court of appeals, Supreme Court).
- The law of 15 June 1994, which came into force on 1 July 1994, provided for the order of entering into force of the new "Law on Courts" and determined the "transitional" competence of the Lithuanian Courts.
- The law of 17 November 1994 provided for new orders of appeals for sentences not yet in force and of cassation for sentences which came into force.

4.6 According to the law of 15 June 1994, the Supreme Court, as of 1 January 1995, hears cassation motions of all decisions taken by the Supreme Court in first instance. A sentenced person or his counsel have thus the right to address the Chairperson of the Supreme Court, the Chairpersons of the county courts or the chairpersons of the division of criminal cases of the above courts to submit cassation motions to the Supreme Court. According to article 419 of the Code of Criminal Procedure, the term for such application was one year.

4.7 In the present case, the author could have made an application for cassation motion until 4 May 1995, one year after the sentence came into force, but no such application was made.

4.8 The application for cassation motion of the author's counsel was made on 28 September 1995 when the term of one year had already expired. The Chairman of the Division of Criminal Cases of the Supreme Court therefore decided on 8 December 1995 that, in accordance with article 3, paragraph 6, of the Law of 15 June 1994, there was no ground for submission of the cassation motion. The same reasoning holds true with respect to the application made by counsel on 2 April 1996.

4.9 The State party also wishes to stress that the author had the right to ask for "restitution of the term for the cassation motion" but did not use it.

4.10 In conclusion, when the sentence was pronounced on 4 May 1994, there was, under the Code of Criminal Procedure then in force, no possibility of cassation motion. However, between the entry into force of the sentence and 1 January 1995, the author and his counsel had the right to request from the Chairperson of the Supreme Court, the Prosecutor-General or their deputies that they submit a "supervisory protest". Moreover, between 1 July 1994, the entry into force of the law of 15 June 1994, and 4 May 1995, the author and his counsel had the right to request from the Chairperson of the Supreme Court, the Chairpersons of the county courts or the chairpersons of the division of criminal cases of the above courts that they submit a cassation motion. None of these possibilities were used by the author. The applications of author's counsel to submit a cassation motion of 28 September 1995 and 2 April 1996 were submitted outside the time limit of one year.

4.11 With respect to article 14, paragraph 5, of the Covenant, the State party notes that the Supreme Court was the highest judicial instance of the State party at the time of the judgement in the present case but that the right of the author to request for a "supervisory protest" between 4 May 1994 and 1 January 1995 and to request a cassation motion between 1 July 1994 and 4 May 1995 should be considered as a review within the meaning of this provision.

4.12 As a result, the author did not exhaust domestic remedies and this part of the communication should be declared inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

Alleged violation of article 14, paragraph 1, of the Covenant

4.13 The State party, referring to a number of provisions of its Constitution and Code of Criminal Procedure, first stresses that, during the proceedings of the author's case, principles such as the independence of the judiciary, equality before the law, the right to legal counsel, or the publicity of the trial, were operating and in conformity with the requirements of article 14, paragraph 1, of the Covenant.

4.14 With respect to the other factual circumstances of the case, the State party states that it is neither able to evaluate the evidence of the criminal case nor to assess their weight among the complexity of evidence contained in this case, which is a discretionary right belonging to the courts.

4.15 The State party is thus of the opinion that the allegations concerning a violation of article 14, paragraph 1, of the Covenant are incompatible with the provision of the Covenant, and this part of the communication should therefore be declared inadmissible under article 3 of the Optional Protocol.

Alleged violation of article 14, paragraph 3 (g)

4.16 The State party draws the attention of the Committee to the provisions of its Code of Criminal Procedure according to which it is forbidden to strive to obtain testimonies of the accused or of other persons taking part in the criminal proceedings using violence, threatening or by any other illegal methods.

4.17 The State party notes that despite allegations of such illegal actions, the author has not used his right under article 52 of the Code of Criminal Procedure to appeal actions and decisions of the interrogator, investigator, prosecutor or the court. Moreover, the author could have submitted these facts to the prosecutor who had then a duty to investigate officially.

4.18 The State party also notes that the testimony given by the author during the trial was not followed by a concrete request addressed to the Court pursuant to article 267 of the Code of Criminal Procedure. The court did not, therefore, take a decision in this regard. Moreover, all testimonies of the accused during the trial have the value of evidence and are assessed by the court when taking its decision.

4.19 The State party is thus of the opinion that the author did not exhaust domestic remedies in this respect and that this part of the communication should be declared inadmissible.

Comments of the author

5.1 By submission of 30 June 1999, the author made his comments on the State party's submission.

5.2 With regard to the alleged violation of article 14, paragraph 5, the author considers that the right to address the Chairperson of the Supreme Court, the Prosecutor-General or their deputies with a request to submit a "supervisory protest" or a cassation motion does not constitute a review within the meaning of article 14, paragraph 5, of the Covenant because the submission of a "supervisory protest" or cassation motion is an exceptional right, depending on the discretion of those authorities and is not a duty.

5.3 The possibility to submit a cassation motion in accordance with the requirement of article 14, paragraph 5, of the Covenant exists only since 1 January 1995.

5.4 With regard to the term of one year to submit a cassation motion, that was allegedly overlapped in the present case, the author claims that the one-year time limit of article 419 of the Code of Criminal Procedure could only be applicable to cassation motions which aim to worsen the situation of a convicted person. According to this provision, "*it is permitted to lodge a cassation complaint about a sentence for applying the law that provides for more major crime* […] *or for other aims, which worsen the situation of a convicted person* […]".[3] The applications for cassation motion of 28 September 1995 and 2 April 1996 were made with the purpose to acquit the author, thus to improve his situation. The requests were thus regular and the time limit of one year could not apply.

5.5 The author, pointing to an apparent contradiction between the State party's argumentation and the content of the letters rejecting the cassation motion, further explains that the decision of 8 December 1995 rejecting the application for a cassation motion was not based on the fact that it exceeded the one-year time limit, but because "*the motives of your cassation complaint* [...] *are denied by evidence, which were examined in court and considered in the sentence*".

5.6 On the second application for a cassation motion of 2 April 1996, the Chairman of the Supreme Court wrote on 5 April 1996 that the law does not provide that the Supreme Court "*is a cassation instance for* [sentences that have] *been adopted by itself*". It added that sentences of the Supreme Court "*are final and* [cannot be appealed, so that retrying] *the case is impossible*". The Chairman of the Supreme Court did not refer to the one-year time limit. The claim under article 14, paragraph 5, is thus sufficiently substantiated.

5.7 With regard to the alleged violation of article 14, paragraph 1, the author reiterates that the principles of criminal procedure were not complied with and that the conclusions of the Court do not therefore follow the merits of the case.

5.8 With regard to the violation of article 14, paragraph 3 (g), the author reiterates that he confessed during the preliminary investigation because he was misled by the investigator and because he had been the victim of violence during investigation. In support of this claim, the author refers to a letter written by the co-defendant to the author's parents, testimonies of Mr. Saulius Peldzius who was in custody with the author, and audio-records of conversation between the author and the investigator. Moreover, the author states that he made a complaint against the investigator to the General Prosecutor of Lithuania on 15 and 30 May 1996 and that the General Prosecutor decided on 12 June 1996 not to investigate.

5.9 *The State party has not made further observations on the author's last submission.*

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to the alleged violation of article 14, paragraph 1 and 3 (g), the Committee notes the author's claims that the judgement of the Supreme Court of 4 May 1994 does not reflect the merits of the case and that, during the investigation, he was forced to confess to the murder for which he was later convicted. In this respect, the Committee has taken note of the undated statement made by the author's co-defendant as well as the testimony given on 15 June 1995 by a cellmate, Saulius Peldzius.

6.4 Recalling that it is in general for the courts of States parties, and not for the Committee, to evaluate the facts in a particular case, the Committee notes that these allegations were raised during the trial and addressed by the Supreme Court in its judgement. Moreover, the information before the Committee and the arguments advanced by the author do not show that the Courts' evaluation of the facts was manifestly arbitrary or amounted to a denial of justice. The Committee is thus of the opinion that the author has not substantiated his claim under article 14, paragraph 1 and 3 (g), of the Covenant and that this claim is therefore inadmissible under article 2 of the Optional Protocol.

6.5 With regard to the alleged violation of article 14, paragraph 5, of the Covenant, the Committee notes the State party's contention that this part of the communication should be declared inadmissible for failure to exhaust domestic remedies. The Committee also notes that the author has four times attempted to obtain a cassation motion on the decision of the Supreme Court but that his requests were either rejected or unanswered. Considering that the parties concede that no domestic remedies are still available, and that the author's claim is based on the alleged absence of a possibility of review of the judgement of 4 May 1994, the Committee is of the opinion that the admissibility of this claim should be considered together with its merits.

On the merits

7.1 Regarding the submission of a "supervisory protest", the Committee notes the State party's contention that the author had, between 4 May 1994 and 1 January 1995, a "right to address the Chairperson of the Supreme Court of Lithuania, the Prosecutor-General and their deputies with a request to submit a supervisory protest", that this possibility constitutes a right to review in the sense of article 14, paragraph 5, of the Covenant, and that the author did not use this right. The Committee also notes the author's contention that the decision to submit a "supervisory protest" is an exceptional right depending on the discretion of the authority who receives the request and does therefore not constitute an obligation to review a case decided by the Supreme Court in first instance.

7.2 In the present case, the Committee notes that, according to the wording of the last sentence of the judgement of 4 May 1994, "[t]he verdict is final and could not be protested or cassation appealed". It also notes that it is not contested by the State party that the submission of a "supervisory protest" constitutes an extraordinary remedy depending on the discretionary powers of the Chairperson of the Supreme Court, the Prosecutor-General or their deputies. The Committee is therefore of the opinion that, in the circumstances, such a possibility is not a remedy that has to be exhausted for purposes of article 5, paragraph 2 (b), of the Covenant. Moreover, recalling its decision in Case No. 701/1996,[4] the Committee observes that article 14, paragraph 5, implies the right to a review of law and facts by a higher tribunal. The Committee considers that the request for the submission of a "supervisory protest" does not constitute a right to have one's sentence and conviction reviewed by a higher tribunal under article 14, paragraph 5, of the Covenant.

7.3 Regarding the submission of a cassation motion, the Committee notes the State party's contention that, between 1 July 1994 and 4 May 1995, it was possible for the Chairperson of the Supreme Court, the Chairpersons of the county courts or the chairpersons of the division of criminal cases of the above courts to entertain a cassation motion at the request of the author, that this possibility constitutes a right to review in the sense of article 14, paragraph 5, of the Covenant, and that the author did not use this right within the time limit of one year from the date the judgement entered into force, that is before 4 May 1995, in accordance with article 419 of the State party's Code of Criminal Procedure. The Committee on the other hand also notes the author's contention that the decision to submit a cassation motion, similarly to that of submitting a "supervisory protest", is an extraordinary right at the discretion of the authority who receives the request and does therefore not constitute an obligation to review a case decided by the Supreme Court at first instance. The Committee further notes the author's contention that the delay of one year referred to by the State party only concerns cassation motions aiming at worsening the situation of the accused.

7.4 The Committee notes that the State party has not provided any comment on the author's arguments related to the prerogatives of the Chairperson of the Supreme Court, the Chairpersons of the county courts or the chairpersons of the division of criminal cases of the above courts on the submission of a cassation motion and the time limit to submit an application for a cassation motion. In this regard, the Committee refers to two letters, transmitted by the author, dated 28 December 1998 (from the Chairman of the Division of the Criminal Cases of the Supreme Court) and 5 April 1996 (from the Chairman of the Supreme Court), both rejecting the application for a cassation motion on the grounds, respectively, that "the motives of [the] cassation complaint [...] are denied by evidence, [which] were examined in court and considered in the verdict" and that "[the State party's legislation] does not provide [that the Supreme Court] is a cassation instance for verdicts [...] adopted by itself. Verdicts of [the Supreme Court] are final and are not appealable". The Committee notes that these letters do not refer to a time limit.

7.5 The Committee, taking into account the author's observations with regard to the extraordinary character and the discretionary nature of the submission of a cassation motion, the absence of response from the State party thereupon, and the form and content of the letters rejecting the applications for a cassation motion, considers that the material before it sufficiently demonstrates that, in the circumstances of the case, the applications made by the author for a cassation motion, even if they had been made before 4 May 1995 as argued by the State party, do not constitute a remedy that has to be exhausted for purposes of article 5, paragraph 2 (b), of the Covenant.

7.6 Moreover, the Committee, recalling its reasoning under paragraph 7.2 above, is of the opinion that this remedy does not constitute a right of review in the sense of article 14, paragraph 5, of the Covenant because the cassation motion cannot be submitted to a higher tribunal as it is required under the said provision.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author(s) with an effective remedy, including the opportunity to lodge a new appeal, or should this no longer be possible, to give due consideration of granting him release. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights

recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The author claims that he has not received any answer on this application.

[2] According to the judgement of the Supreme Court of 4 May 1994, the "injuries [inflicted on the victim caused intense] pain and the defendants could understand it. The defendants [inflicted] the injuries deliberately and they wanted to do it. They did the crime of malice prepense and thus their actions are qualified justly pursuant to Lithuanian Republic [Criminal Code] article 105 (5) - cruel premeditated murder".

[3] As translated by the author.

[4] *Cesario Gómez Vásquez v. Spain*, Case No. 701/1996, Views adopted on 20 July 2000.

I. Communication No. 838/1998, *Hendricks v. Guyana** (Views adopted on 28 October 2002, seventy-sixth session)

Submitted by:	Oral Hendricks
Alleged victim:	The author
State party:	Guyana
Date of communication:	5 June 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2002,

Having concluded its consideration of communication No. 838/1998, submitted to the Human Rights Committee on behalf of Mr. Oral Hendricks under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. Oral Hendricks, a citizen of Guyana, at the time of submission of the communication, detained in Georgetown Prison, Georgetown, Guyana. He claims to be a victim of human rights violations by Guyana.[1] The author does not invoke any specific provision of the Covenant, however, the communication appears to raise issues under articles 9 and 14 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

1.2 In accordance with rule 86 of the Committee's rules of procedure, the Committee requested the State party on 28 September 1998 not to carry out the death sentence against the author while the communication is under consideration by the Committee.[2]

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

The text of an individual opinion signed by Committee member Mr. Hipólito Solari Yrigoyen is appended to the present document.

The facts as submitted by the author

2.1 The author, who was suspected of having murdered, on 12 December 1992, his three step-children aged 2, 4 and 7, was arrested on 13 December 1992 in West Bank Demerara, Guyana.

2.2 On 5 February 1996, the author was sentenced to death by hanging by a trial court in West Demerara County. On 4 July 1997, the Court of Appeal confirmed his sentence.

The complaint

3.1 The author claims a violation of his Covenant rights because he was denied access to a lawyer when questioned after his arrest.

3.2 The author further alleges that, as his lawyer was absent at one of the hearings of the "small" court, he was not permitted to cross-examine one witness during the trial.

3.3 The author claims that some statements of witnesses were not transmitted to his counsel and that the only reaction of the judge was to tell the prosecution that this should have been done.

3.4 The author alleges that he was forced to sign a confession, as when he asked for some food and water, he was told that he would receive food and water only if he signed a confession.

3.5 The author asserts that he has exhausted domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement.

The State party's submission on the admissibility and merits of the communication

4. Notwithstanding the Committee's request to the State party by note verbale of 28 September 1998 and the Secretariat's reminders of 7 February 2000, 14 December 2000 and 5 October 2001, the State party has not made any submission on the admissibility or the merits of the case.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

5.3 The Committee has also ascertained, from the material before it, that the author has exhausted domestic remedies for purposes of article 5, paragraph 2 (b), of the Optional Protocol and the State party has raised no objection in this regard.

5.4 The Committee is of the opinion that the communication raises issues under articles 6, 9, paragraph 3 and 14, paragraph 3 (c), (d), (e) and (g) of the Covenant and therefore declares the communication admissible.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it as provided in article 5, paragraph 1, of the Optional Protocol. Moreover, in the light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that they have been substantiated. The Committee recalls in this respect that a State party has an obligation under article 4, paragraph 2, of the Optional Protocol to cooperate with the Committee and to submit written explanations or statements clarifying the matter and the remedy, if any, that may have been granted.

6.2 As to the allegations related to the question of whether or not he was informed of his right to be assisted by a lawyer when he was questioned after his arrest and also the question of his forced confession, raising possibly issues under article 14, paragraph 3 (d) and (g), of the Covenant, the Committee notes that the trial transcript reveals that the author's counsel fully canvassed those issues before the trial court with a view to render his confession inadmissible in evidence and that the Court duly considered it. In this connection, the Committee reiterates its jurisprudence that it is primarily for the courts of States parties to the Covenant to review facts and evidence in a particular case. It is for the appellate courts of States parties to the Covenant, and not for the Committee, to review the conduct of the trial and the judge's instructions to the jury, unless it can be ascertained that the evaluation of evidence was clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The trial transcript in the author's case did not reveal that his trial suffered from such defects. Accordingly, this part of the communication does not reveal a violation of article 14, paragraph 3 (d) and (g) of the Covenant.

6.3 With regard to the issues raised under articles 9, paragraph 3, and 14, paragraph 3 (c) of the Covenant, the Committee notes that the author was tried more than three years after he was arrested. Recalling its general comment No. 8, according to which "pre-trial detention should be an exception and as short as possible", and noting that the State party has not provided any explanation justifying such a long delay, the Committee considers that the period of pre-trial detention constitutes in the present case an unreasonable delay. The Committee therefore concludes that the facts before it reveal a violation of article 9, paragraph 3, of the Covenant. Furthermore, recalling the State party's obligation to ensure that an accused person be tried without undue delay, the Committee finds that the facts before it also reveal a violation of article 14, paragraph 3 (c), of the Covenant.

6.4 As to the allegations according to which his lawyer was absent on one day at the "small" court, and that as a consequence he was denied the right to cross-examine one witness, the Committee notes from the information before it, that the author in fact refers to the preliminary hearing where his counsel was apparently absent at one stage and that this was not disputed by the State party. The Committee recalls its prior jurisprudence that, in capital cases, it is axiomatic that legal assistance be available at all stages of criminal proceedings.[3] It also recalls its decision in communication No. 775/1997 (*Brown v. Jamaica*), adopted on 23 March 1999, in which it decided that a magistrate should not proceed with the deposition of witnesses during a preliminary hearing without allowing the author an opportunity to ensure the presence of his lawyer. Accordingly, the Committee finds that the facts before it disclose a violation of article 14, paragraph 3 (d) and (e) and, consequently, of article 6 of the Covenant.

6.5 As to the allegations according to which some of the witnesses' statements were not transmitted to the author's counsel, raising possibly an issue under article 14, paragraph 3 (e) of the Covenant, the Committee notes that the trial transcript does not contain any indication in this respect and is therefore of the opinion that the author has not substantiated his claim of a violation of article 14, paragraph 3 (e), of the Covenant in this respect.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 9, paragraph 3 and 14, paragraph 3 (c), (d) and (e) and consequently of article 6 of the International Covenant on Civil and Political Rights.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including commutation of sentence. The State party is also under an obligation to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Government of Guyana had initially acceded to the Optional Protocol on 10 May 1993. Subsequent to the submission of the communication, on 5 January 1999, the Government of Guyana notified the Secretary-General that it had decided to denounce the said Optional Protocol with effect from 5 April 1999. On that same date, the Government of Guyana re-acceded to the Optional Protocol with a reservation ("Guyana re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 6 thereof with the result that the Human Rights Committee shall not be competent to receive and consider communications from any person who is under sentence of death for the offences of murder and treason in respect of any matter relating to his prosecution, detention, trial, conviction, sentence or execution of the death sentence and any matter connected therewith").

[2] The State party has not informed the Committee as to its compliance with the request.

[3] See inter alia, the Committee's Views in respect of communication No. 695/1996, *Devon Simpson v. Jamaica*, adopted on 31 October 2001, communication No. 730/1996 *Clarence Marshall v. Jamaica*, adopted on 3 November 1998, communication No. 459/1991, *Osbourne Wright and Eric Harvey v. Jamaica*, adopted on 27 October 1995, and communication No. 223/1987, *Frank Robinson v. Jamaica*, adopted on 30 March 1989.

APPENDIX

Individual opinion by Committee member Mr. Hipólito Solari Yrigoyen (dissenting)

I disagree with regard to the present communication on the grounds set forth below:

In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including commutation of sentence and adequate compensation or consideration of early release. The State party is also under an obligation to prevent similar violations in the future.

(*Signed*): Hipólito Solari Yrigoyen

J. Communication No. 852/1999, *Borisenco v. Hungary**
(Views adopted on 14 October 2002, seventy-sixth session)

Submitted by:	Mr. Rostislav Borisenko
Alleged victim:	The author
State party:	Hungary
Date of communication:	2 August 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 14 October 2002,

Having concluded its consideration of communication No. 852/1999, submitted to the Human Rights Committee by Mr. Rostislav Borisenko under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Rostislav Borisenko, a Ukranian citizen, currently residing in the Ukraine. He claims to be a victim of violations by the Republic of Hungary of the International Covenant on Civil and Political Rights. The communication appears to raise issues under articles 7, 9, paragraphs 1, 2, and 3, 13, 14, paragraphs 2 and 3 (c), (e) and (g) and 17 of the Covenant. He is not represented by counsel.

The facts as submitted by the author

2.1 On 29 April 1996, the author and his friend, Mr. Kuspish arrived in Budapest. They were at the time en route from Belgrade where, as members of the Sambo Wrestling National Team of the Ukraine, they had taken part in a wrestling competition, and were on their way back to the Ukraine. Later that day, they lost their way and asked a travel agent where the metro station was located. Because they were late for their train, they ran to the metro station. At this point, they were stopped by three policemen in civilian clothing. The police suspected them of pickpocketing. They ill-treated the author and his friend by "tightening handcuffs and striking our heads against metal booths when we attempted to speak". They were interrogated for three hours at the police station.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, and Mr. Maxwell Yalden.

The text of three individual opinions signed by Committee member Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati and Mr. Hipólito Solari Yrigoyen is appended to the present document.

2.2 On 30 April 1996, the author and his friend were charged with theft. Although the charge was not translated from Hungarian they were provided with an interpreter. Mr. Kuspish signed the investigation report but the author refused to do so without the presence of a lawyer and without including his version of the facts of the incident. The author and his friend lodged complaints against their arrest and interrogation. On 1 May 1996, in a written decision, the public prosecutor rejected these complaints, having reviewed the legality of the arrest and detention.

2.3 On 2 May 1996 the author and his friend were brought before the Pescht Central District Court for the purpose of deciding whether they should be remanded in custody. The court decided to detain them due to the risk of flight. During the police interrogation, the hearing on detention and the detention itself, the author and his friend were not allowed to contact their Embassy, families, lawyers or sports organization. On 7 May 1996, the police authorities completed the investigation and referred the case to the public prosecutor's office.

2.4 On 15 May 1996, and at the request of the Ukrainian Embassy, the public prosecutor terminated the author and his friend's detention. On the same date, the immigration authorities ordered the author and his friend expelled from Hungary prohibiting their re-entry and stay in the country for five years. On requesting the police officers whether they could challenge the expulsion order, they were informed, through an interpreter representing the Ukranian Embassy, that it was not possible to appeal. At the same time, the author and his friend unknowingly signed a waiver of their right to appeal.[1] A translation of the expulsion order was not provided. It was only when the author and his friend returned to the Ukraine and saw an English translation of the order that they became aware that it would have been possible to appeal against the expulsion order and that they had unwittingly waived their right to appeal. Upon guarantees offered by the Ukranian Embassy that the author and his friend would comply within a prescribed time to leave the Republic of Hungary, they were not deported. The author and his friend left the country on 16 May 1996.

2.5 On 3 July 1996, after reprimanding the author and his friend under section 71 of the Hungarian Code of Criminal Procedure, the public prosecutor's office discontinued its investigations under section 139[2] of the Code as "their conduct ceased to be punishable".[3]

2.6 On 17 November 1996, the author and his friend lodged a complaint against this decision requesting an acknowledgment of their innocence and claiming that they were maltreated by the investigating police. On 12 June 1997, and on the basis of the author and his friend's complaint, the Municipal Chief Public Prosecution's Office quashed the decision of 3 July 1996 and instructed the District Public Prosecution's office to continue proceedings.

2.7 On 28 May 1998, the case file was sent to the Ukrainian authorities so that the case could be conducted in the Ukraine. On 13 November 1998, the author was informed by the Ukrainian Ministry of Foreign Affairs that, on the basis of the information before it, the Ukrainian authorities did not intend to institute criminal proceedings against the author and his friend.

2.8 The Hungarian authorities investigated the author and his friend's complaints against the police and in a decision, dated 30 October 1998, the investigation was discontinued. Although the author challenged this decision, he did not receive a response from the authorities.

The complaint

3.1 The author complains that his rights were violated as he was arrested and charged without any proof of being involved in criminal activity and was ill-treated by police on arrest. He claims that he did not understand what he was being charged with and that the charge itself was not translated. He also claims a violation of the Covenant, for having been detained for over two weeks without trial.

3.2 The author complains that the State party has violated the Covenant, as he was unlawfully expelled and denied the possibility of review. He claims that the law dealing with expulsion states that the entry of a foreigner may be prohibited if he/she commits a premeditated crime, for which he/she is sentenced to more than five years of imprisonment. In this case, the author was only charged with a crime for which the maximum possible sentence is two years. In addition, he claims that the police deceived him on serving the deportation order on him, as they claimed incorrectly that he had no right to appeal.

3.3 The author claims a violation of the Covenant as he was not tried "without undue delay", and because an important witness to the incident was not called for the detention hearing.

3.4 The author also claims a violation of the Covenant as, although he made numerous requests for a lawyer, one was not made available to him and he was refused contact with his friends and Embassy, from the time of his arrest to his release from detention.

3.5 Finally the author claims a violation of the Covenant, as due to his detention he could not take part in the Judo European rating championship nor participate in the Olympic Games. Also, as a director in a law firm, he incurred loss of reputation as well as clients. He also lost his "sports qualification" and was looked upon badly by the members of the Sambo Wrestling Club of the Ukraine, family and friends.

State party's submission on the admissibility and merits of the communication

4.1 By letter of 19 April 1999, the State party made its submission on the admissibility and merits of the communication. It contests the author's version of the events leading to the author's arrest and presents them as follows. On 29 April 1996, in Budapest, three plainclothes policemen saw two men in a tram, one asking a woman a question while the other unzipped her handbag and put his hand into her bag. When the policemen signalled to the woman what was going on the two men suddenly jumped off the tram. The woman told the policemen that although she had a purse in a different part of her bag, she only had papers in the part into which one of the men put his hand. Having got off the tram at the next stop, the policemen caught the two men, handcuffed them by physical force and took them to the police station. Through an interpreter the order for arrest was communicated to them against which they both lodged a complaint.

4.2 On 30 April 1996, the author and his friend were charged by the police with attempted theft and informed of the charges by an interpreter. The investigating authorities ordered a defence counsel for each alleged victim. The defence counsel failed to appear either at the police interrogation or the detention hearing. They appeared only at the "presentation of the files" when the investigations were closed by the police and the case was referred to the prosecution's office.

4.3 On admissibility, the State party submits that the author's claim of a violation of article 13 is inadmissible for failure to exhaust domestic remedies. When the order for expulsion was communicated to the author, through an interpreter, he was also informed of the fact that the decision was subject to appeal but that the appeal did not have suspensive effect for the execution of the decision. As he failed to exercise his right to appeal, he prevented the State from the opportunity of fully inquiring and redressing any alleged violations. The State party also submits that if the author had been unsuccessful in his appeal he could have then sought judicial review of this decision. On the author's claim that he had been deceived on the possibility of appealing the expulsion order, the State party submits that the author never brought this issue to the attention of the authorities and, considering the presence of a representative from the Ukrainian Embassy during this incident, such a complaint would have been easy to substantiate.

4.4 On the complaint that from the time of arrest to his release from detention, the Hungarian authorities prevented the author from making contact with a lawyer, friends or his Embassy, the State party submits that this allegation is similarly inadmissible for failure to exhaust domestic remedies. According to the State party, the author could have lodged a complaint in the same way as he did against his arrest and interrogation.

4.5 With respect to the allegations of violations of article 14, the State party submits that these allegations are inadmissible ratione materiae, as the author was not arraigned by the Hungarian authorities and the only issue considered in court was the order for detention on remand.

4.6 On the merits, the State party contests that there has been a violation of article 9 of the Covenant. It submits that upon arrest the author was informed, through his interpreter, of the reasons for his arrest and was brought before a court within three days. At the detention hearing the court considered, in a procedure established by law, whether there was a "reasonable suspicion" that an offence had been committed by the author. On the basis of the evidence presented the court found that such suspicion existed. According to the State party, the author was detained as he had no place of residence in Hungary and in the opinion of the court was likely to abscond. In addition, the court found that because of the nature of the offence with which he was charged there was a fear of recidivism. The State party also submits that the duration of the author's detention did not exceed a reasonable time.

4.7 The State party also adds that the author's complaint about ill-treatment received at the hands of the police, which relates to the question of the lawfulness of the arrest, was investigated by the public prosecutor's office. The State party submits that Mr. Kuspish's statement was taken from which it was established that the allegations were ill-founded and, except for the handcuffing, no violence had been used. According to the State party, the Hungarian authorities could not examine the author's statement, as his place of residence was unknown even to the Ukrainian authorities and he could not be contacted. In sum, it is the State party's view that all the requirements of the rights protected under article 9 were complied with.

4.8 In the event that the Committee decides that the allegation of a violation of article 13 is admissible, the State party submits that there has been no violation of article 13 as section 23, paragraph 2, of the Aliens Act provides that prohibition of entry and stay in the country may be imposed in respect of foreign nationals whose entry or stay may injure or jeopardize public safety. It was believed that the author's stay in the Republic of Hungary would so jeopardize public safety due to the pick-pocketing charge and was, therefore, lawful.

Comments by the author

5.1 By letter, of 1 July 1999, the author responded to the State party's submission. On the issue of the expulsion order, the author affirms that he did lodge a complaint against the police for deceiving him on the possibility of an appeal, to the "Procurator-General" prior to his departure from Hungary and through the Consular Section of the Ukrainian Embassy.

5.2 On the State party's argument that he failed to exhaust domestic remedies by not making a complaint about the State party's refusal to allow him to contact his lawyer, Embassy or friends, the author states that he had no opportunity to make such a complaint.

5.3 With respect to the State party's argument on the failure to take a further statement from the author on ill-treatment by the police, the author submits that he did provide such evidence, having received documents sent from the Office of the Procurator-General of the Republic of Hungary, on 10 March 1998, through the Procurator-General of the Republic of the Ukraine. The author responded to questions posed by the Hungarian authorities and provided them with a statement of his version of the treatment received.

5.4 With respect to the State party's argument that the author's stay in Hungary would jeopardize public safety, the author questions how the State party arrived at this conclusion considering the fact that he had not been convicted of any offence.

5.5 The author confirms that a lawyer appeared on his behalf at the "presentation of the files" when the investigation was complete, but says that one lawyer was allocated for both alleged victims and that neither of them were given an opportunity to talk to him.

5.6 The author makes the following new claims in relation to his case. Firstly, that the State party violated article 14, paragraph 2, of the Covenant, as the author's expulsion from Hungary on the basis of a charge of which he had not been convicted was a violation of the presumption of innocence. Secondly, that the State party violated article 14, paragraph 3 (g), as the author claims to have been pressured to testify against himself by not allowing him to go to the toilet while in detention and telling him that if he made a complaint, it would take one month to process and he would be detained for the whole period.

5.7 The State party has not made any additional observations on the admissibility or the merits of this case.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 On the issue of the State party's failure to provide the author with access to a lawyer, the Committee notes the State party's argument that the author could have made a complaint in the same way as he had done when challenging the lawfulness of his arrest and interrogation. The Committee notes that the State party does not provide any details of how the author would have made such a complaint. Neither does it state whether the author was informed of this possibility at the time he requested legal representation and access to a representative from his Embassy. As a Ukrainian citizen detained in a prison outside his home country and without the necessary language skills to find out how to make such a complaint, the Committee decides that the State party has not provided sufficient information to demonstrate that this remedy would have been effective. The Committee finds that this part of the communication is therefore admissible (see paragraph 3.4).

6.4 On the issue of his expulsion, the Committee notes that the author has explained this failure to appeal against the expulsion order by alleging that he was informed by the police who served the expulsion order on him that he could not appeal the decision and was deceived into signing a waiver of his right to appeal. The State party argues that the author was told, through an interpreter from the Ukrainian Embassy, that he could appeal the order but that it would not have suspensive effect. The Committee observes that the author was accompanied by an interpreter from the Ukrainian Embassy who would have been in a position to translate the expulsion order which, the author concedes, included an explanation that he had a right to appeal. Accordingly, the Committee finds this part of the communication inadmissible for failure to exhaust domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol (see paragraphs 3.2 and 5.6).

6.5 With respect to the claims of a violation of article 14, paragraph 2, because of an alleged violation of the presumption of innocence, paragraph 3 (g), as the author claims to have been pressured to testify against himself, and his further claims that, the author was not tried without undue delay, and that a witness to the incident was not summoned to the detention hearing, the Committee finds that the author has failed to substantiate these claims for purposes of admissibility. These claims are therefore inadmissible under article 2 of the Optional Protocol (see paragraphs 3.3 and 5.6).

6.6 Similarly, on the issue of a violation of the Covenant as, due to his detention, he suffered a loss of reputation, both personally and professionally, the Committee is of the view that in this respect the author has failed to substantiate a claim of a violation of the Covenant for the purposes of admissibility. The Committee is also of the view that the author's claim of ill-treatment by the police, which raises an issue under article 7 of the Covenant, is similarly unsubstantiated. The Committee therefore finds these claims inadmissible under article 2 of the Optional Protocol (see paragraphs 3.5 and 3.1).

6.7 The Committee notes that the State party has raised no objections to the admissibility of the author's claims under article 9, of the Covenant concerning his arrest and detention and the failure to provide him with legal representation despite his requests. The latter claim also raises an issue under article 14, paragraph 3 (d) of the Covenant. Accordingly, the Committee declares these parts of the communication admissible (see paragraph 3.1).

6.8 On the basis of the above, the Committee finds that the parts of the communication relating to the author's arrest and detention and the failure to provide him with legal representation are admissible.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 With respect to the claim that the State party violated article 9, paragraph 1, of the Covenant, the Committee recalls that, pursuant to this article, no one shall be subjected to arbitrary arrest or detention. The State party argues and the author has not contested that he was arrested on suspicion of having committed an offence. In these circumstances, the Committee cannot find a violation of article 9, paragraph 1 of the Covenant (see paragraph 3.1).

7.3 With respect to the author's claim that the State party violated article 9, paragraph 2, of the Covenant as he did not understand the reasons for his arrest or the charges against him, the Committee notes the State party's argument that the author was provided with an interpreter who explained to him the reasons for his arrest and the charge against him and finds that in the circumstances, the Committee is unable to find a violation of the Covenant in this regard (see paragraph 3.1).

7.4 With regard to the claim of a violation of article 9, paragraph 3, the Committee notes that the author was detained for three days before being brought before a judicial officer. In the absence of an explanation from the State party on the necessity to detain the author for this period, the Committee finds a violation of article 9, paragraph 3 of the Covenant.

7.5 With respect to the author's claim that he was not provided with legal representation from the time of his arrest to his release from detention, which included a hearing on detention at which he had to represent himself, the Committee notes that the State party has confirmed that although it assigned a lawyer to the author, the lawyer failed to appear at the interrogation or at the detention hearing. In its previous jurisprudence, the Committee has made it clear that it is incumbent upon the State party to ensure that legal representation provided by the State guarantees effective representation. It recalls its prior jurisprudence that legal assistance should be available at all stages of criminal proceedings. Consequently the Committee finds that the facts before it reveal a violation of article 14, paragraph 3 (d) of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 9, paragraph 3, and 14, paragraph 3 (d) of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] According to the author he understood the request to write "no" on the expulsion order to mean that he objected to the order itself rather than a wish not to enter an appeal.

[2] Section 139 reads as follows: "(1) Investigations shall be terminated by an order if … (c) there is a reason which excludes or terminates punishability …".

[3] Section 71 reads as follows: "Persons not punishable owing to the fact that the degree of the threat the committed offence poses to society has become negligible (section 36) shall be reprimanded … (3). By a reprimand the authority expresses its disapproval and invites the offender to refrain in the future from committing criminal offences." According to the State party these decisions were served in the Russian translation on the persons concerned via the public prosecutor's office of Ukraine. Section 36 reads as follows: "The person whose act at the time of its adjudication does no longer pose a threat to society or if the threat it poses is of such a negligible degree that also with respect to his person even the most lenient punishment applicable in accordance with this Act is unnecessary, shall not be punished."

APPENDIX

Individual opinion of Committee member Mr. Nisuke Ando

I concur with the Committee's finding that there was a violation of article 14, paragraph 3 (d) because the State party failed to ensure effective legal representation for the author (7.5). However, I am unable to share the Committee's finding that the State party violated article 9, paragraph 3, because the author had been detained for three days before being brought before a judicial officer and that the State party failed to explain the necessity to detain the author for this period (7.4).

As a matter of fact, on 29 April 1996, the author and his friend were arrested on suspicion of pick-pocketing (2.1 and 4.1). On 30 April 1996, they were charged with theft and on 1 May 1996, their complaints against their arrest and interrogation were rejected by the public prosecutor in a written decision (2.2 and 4.2). On 2 May 1996, the author and his friend were brought before the Pescht Central District Court for the purpose of deciding whether they should be remanded in custody, and the court decided to detain them due to the risk of flight (2.3).

This series of events clearly indicates what happened during the three days (29 April-2 May 1996), which both the author and the State party admit. In addition, while the author claims a violation of the Covenant for having been detained for over two weeks without trial (3.1 and 3.3), he does not specifically claim that the detention for the three days in question constitutes a violation of article 9, paragraph 3. Indeed, it is the Committee itself which singles out the issue of the three days' detention and, basing itself on the failure of the State party's explanation, decides that the detention constitutes a violation of article 9, paragraph 3.

Under the circumstances, I do not consider that the State party is to blame for having failed to explain the necessity for the detention. Furthermore, as far as I remember, the Committee has never decided that the detention for three days, as such, constitutes a violation of article 9, paragraph 3. For these reasons I am unable to concur with the Committee's Views in this respect.

(*Signed*): Nisuke Ando

Individual opinion of Committee member Mr. P.N. Bhagwati

I am in agreement with the finding of the Committee that there was a violation of article 14, paragraph 3 (d) of the Covenant. But I am unable to agree that there was violation of article 9, paragraph 3 because the author had been detained for two days before being brought before a judicial officer.

The principal reason why I am unable to agree with the Committee in regard to the alleged violation of article 9, paragraph 3 is that this complaint was not made by the author in the communication filed by him and the only complaint made in this respect was that he was detained for two weeks without trial and in the circumstances, it would not be correct to hold that the State party having failed to explain the delay of three days in bringing the author before a judicial officer such delay must be regarded as constituting a violation of article 9, paragraph 3 of the Covenant. When the author did not specifically make this complaint in his Communication, how can the State party be expected to deal with and explain this delay of three days? No inference could therefore be drawn from the State party not having explained the delay of three days. If the specific complaint had been made, the State party would have been called upon to explain the delay and if the State party did not offer an acceptable explanation, the Committee would have been justified in finding a contravention of article 9, paragraph 3. But not so, when a specific complaint of delay of three days was not made in the Communication. Moreover, I am unable to agree that article 9, paragraph 3 envisages a rigid, inexorable rule that a person detained must be produced before a judicial officer within 48 hours of his arrest. The determination of compliance or non-compliance with the requirement of article 9, paragraph 3 must ultimately depend on the facts of each case.

I am accordingly of the opinion that in the present case, it would not be correct to hold that there was a violation of article 9, paragraph 3 of the Covenant.

(*Signed*): P.N. Bhagwati

Individual opinion by Committee member Mr. Hipólito Solari Yrigoyen (dissenting)

I disagree with regard to the present communication on the grounds set forth below:

In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including commutation of sentence and adequate compensation or consideration of early release. The State party is also under an obligation to prevent similar violations in the future.

(*Signed*): Hipólito Solari Yrigoyen

K. Communication No. 856/1999, *Chambala v. Zambia**
(Views adopted on 15 July 2003, seventy-eighth session)

Submitted by:	Alex Soteli Chambala
Alleged victim:	The author
State party:	Zambia
Date of communication:	18 April and 30 July 1997 (initial submissions)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 July 2003,

Having concluded its consideration of communication No. 856/1999, submitted to the Human Rights Committee by Mr. Alex Soteli Chambala under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Alex Soteli Chambala, a Zambian citizen, born in 1948. He claims to be a victim of a violation by Zambia[1] of the International Covenant on Civil and Political Rights (the Covenant) article 9, paragraphs 3 and 5. He is not represented by counsel.

The facts as presented by the author

2.1 The author was arrested and detained without charge on 7 February 1987. He was served with a Police Detention Order[2] pursuant to Regulation 33 (6) of the Preservation of Public Security Act on 12 February 1987. On 24 February 1987 the Police Detention Order was revoked, but on the same day he was served with a Presidential Detention Order pursuant to Regulation 33 (1) of the Preservation of Public Security Act. The grounds of the detention were served on the author on 5 March 1987; they state that he was being detained for (a) receiving and keeping an escaped prisoner, Henry Kalenga, at his house, (b) whom the author knew was detained for offences under the Preservation of Public Security Act, (c) that he assisted Mr. Kalenga in his attempt to flee to a country hostile to Zambia, and d) that he never reported the presence of Mr. Kalenga to the Security Forces.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski, Mr. Maxwell Yalden.

2.2 After detention for over one year without any production before a court or a judicial officer, the author applied for release. On 22 September 1988, the High Court of Zambia decided that there were no reasons to keep him in detention. Nevertheless, the author was not released until December 1988, when the President revoked his detention. According to the author, the maximum prison sentence for the offence he was charged with was six months.

2.3 The author argues that under Zambian law a person cannot seek compensation for unlawful detention. Furthermore, when he inquired with lawyers about the possibilities to submit a claim, he was told that his case was statute barred under Zambian laws. Thus, no domestic remedies are said to be available. Nevertheless, when the author learned that Peter Chico Bwalya and Henry Kalenga had received compensation after the adoption of decisions by the Human Rights Committee,[3] he wrote to the Attorney-General's Office seeking compensation. Although the letters were registered at the Attorney-General's Office, he received no reply.

The complaint

3.1 The author claims that the State party, by detaining him arbitrarily for almost two years, without bringing him before a judge or other officer authorized by law to exercise judicial power, has violated his rights under article 9, paragraphs 3 and 5 of the Covenant. These events may also raise further issues under article 9 of the Covenant.

The State party's submission on the admissibility and the merits of the communication

4. By Note verbale of 26 March 2001, the State party conceded the events described in the communication, and indicated that it would be contacting the complainant with a view to compensating him for the period of detention at issue.

Subsequent communications with the parties

5.1 In his letters of 20 June and 9 November 2001, and again on 30 January 2002, the author advised the Committee that he had not yet received compensation from the State party. In the last letter, he wrote that he had reminded the Attorney-General's Office, which is responsible for the payment, on 9 November 2001.

5.2 By note verbale of 7 March 2002, the Secretariat reminded the State party to fulfil its promise to compensate the author without further delay and requested the State party to inform it of the measures taken. No response was received from the State party.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee notes with concern that although the State party has conceded the truth of the facts alleged in the communication and has undertaken to compensate the author for the period of detention at issue, and in spite of a reminder from the Secretariat to this effect, the State party has failed to fulfil its undertaking.

6.4 The Committee notes that the State party has not contested the admissibility of the communication. On the basis of the information before it, the Committee therefore concludes that the author has met the requirements under article 5, paragraph 2 (b), of the Optional Protocol, and that there are no other obstacles for his claims to be admissible in respect of possible violations of article 9.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information provided by the parties. It notes with concern the lack of information from the State party, and recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that a State party examine in good faith all the allegations brought against it, and that it provide the Committee with all the information at its disposal. The State party has not forwarded any pertinent information to the Committee other than its note of 26 March 2001. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

7.2 With regard to the author's allegation that he was subjected to arbitrary detention, the Committee has noted that the author was detained for a period of 22 months, dating from 7 February 1987, a claim that has not been contested by the State party. Moreover, the State party has not sought to justify this lengthy detention before the Committee. Therefore, the detention was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1, read together with article 2, paragraph 3.

7.3 The Committee further notes that the author's detention for the further two months following the High Court's determination that there were no grounds to hold him in detention was, in addition to being arbitrary in terms of article 9, paragraph 1, also contrary to Zambian domestic law, thus giving rise to a violation of the right to compensation under article 9, paragraph 5.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it, disclose violations of article 9, paragraph 1, read together with article 2, paragraph 3, and of article 9, paragraph 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In view of the fact that the State party has committed itself to pay compensation, the Committee urges the State party to grant as soon as possible compensation to the author for the period that he was arbitrarily detained from 7 February 1987 to December 1988. The State party is under an obligation to ensure that similar violations do not occur in the future.

10. By becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in cases in which a violation of the Covenant has been found by the Committee. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 10 July 1984.

[2] The Police Detention Order dated 12 February 1987 states that the author should be detained for a period not exceeding 28 days pending a decision whether a Detention Order should be made against him.

[3] See *Bwalya v. Zambia*, Case No. 314/1988, Views adopted on 14 July 1993, and *Kalenga v. Zambia*, Case No. 326/1988, Views adopted on 27 July 1993.

L. Communication No. 864/1999, *Ruiz Agudo v. Spain** (Views adopted on 31 October 2002, seventy-sixth session)

Submitted by:	Mr. Alfonso Ruiz Agudo (represented by Mr. José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of decision on admissibility:	15 March 2001

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2002,

Having concluded its consideration of communication No. 864/1999 submitted by Mr. Alfonso Ruiz Agudo under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Alfonso Ruiz Agudo, a Spanish citizen. In his communication of 12 March 1998, he claims that he was the victim of a violation by Spain of article 14 of the International Covenant on Civil and Political Rights. In his communication dated 27 August 1999, he also maintains that he was the victim of a violation of article 7 and article 10, paragraph 3, of the Covenant. The author is represented by counsel.

The facts as submitted by the author[1]

2.1 From 1971 to 1983, Alfonso Ruiz Agudo held the post of Director of the Caja Rural Provincial in the small town of Cehegín (Murcia), where he was responsible for customer relations. In the period from 1981 to 1983, 75 fictitious loan policies, which duplicated an equal number of real loans, were transacted in the office of the Cehegín bank. In other words, there were bank customers who signed blank loan forms that were later completed in duplicate.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèle Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

2.2 The Caja Rural Provincial was taken over by the Caja de Ahorros de Murcia, and both banks appeared in the criminal proceedings opened against Alfonso Ruiz Agudo and others as private complainant or injured party. Alfonso Ruiz Agudo's counsel immediately asked for the original files of the accounts, which the author kept at the Cehegín bank and where, according to the complainant, the money from the fictitious loans was deposited, to be produced at the proceedings. According to the author of the communication, these files would have shown that the money went not to Alfonso Ruiz Agudo but to other persons. The bank submitted a computerized version of the files.

2.3 Counsel maintains that, although proceedings were initiated against his client in 1983, no judgement was handed down until 1994. The judgement was eventually passed by the judge of the No. 1 Criminal Court of Murcia, sentencing the author to a custodial penalty of two years, four months and one day of ordinary imprisonment with a fine for an offence of fraud, and to a further identical penalty for the offence of falsifying a commercial document.

2.4 The author submitted an appeal against the sentence, on the grounds that there had been a serious error in the assessment of the evidence and that he had been convicted for acts that had in fact been committed by another person. He also complained that uncertified evidence (in the form of a computerized version of his accounts) had been used against him.

2.5 A ruling was issued on his appeal by the Third Division of the Court of Murcia in a judgement on 7 May 1996. According to counsel, this ruling contains arguments that are incompatible with the right to presumption of innocence, which implies that the burden of proof must always rest with the accusing party, when it states that:

> "(…) it has been found that the accused, Mr. Alfonso Ruiz Agudo, channelled the defrauded sums through his own account and others to which he had access, even though the finding was based on computer data produced by the employees of the said Caja de Ahorros, a procedure that the defence experts themselves considered to be normal, while there is no doubt that it would have been preferable to have the originals of the accounting transactions concerned. On the other hand, data or facts to challenge the reliability of the computer files should have been produced."

2.6 According to counsel, the last sentence of this paragraph shows that the Appeals Court adopted an attitude that is incompatible with the right to presumption of innocence, since it is assuming that the accused is guilty as long as he does not prove his innocence, and since completely uncertified evidence is considered sufficient to deprive his client of his right to be presumed innocent and to require prosecution evidence to offer guarantees of reliability.

2.7 A preventive *amparo* application was brought before the Constitutional Court against the ruling of the Provincial High Court of Murcia and was subsequently rejected by a decision of 18 September 1996. According to counsel, all domestic remedies were thereby exhausted.

2.8 The author's counsel maintains that the defendant was the victim of a frame-up by the Caja Rural, subsequently taken over by the Caja de Ahorros de Murcia, in order to blame him for illegal acts that he had not committed, proof of which he had tried to demonstrate on the basis of his original bank files. Moreover, according to the author, the Caja de Ahorros submitted a falsified document blaming Alfonso Ruiz Agudo for having arranged a loan for a sum of 90 million pesetas, which he had not requested, using for the purpose a blank form that he had signed.

2.9 In a second communication, dated 27 August 1999, the author's counsel reported that the No. 1 Criminal Court of Murcia, in an order dated 25 September 1998, had informed the author that the Council of Ministers had rejected his application for pardon and that he had to go to prison. That decision was appealed before the judge and subsequently before the Provincial High Court on the grounds that the penalty imposed, considering the enormous interval of 16 years that had passed since the beginning of the proceedings, violated the right not to be subjected to cruel or degrading punishment and for the penalty to serve a rehabilitating purpose. The Criminal Court and the High Court both rejected the author's claims.

2.10 The author brought another *amparo* application before the Constitutional Court on 21 October 1998, after being informed of the decision by the judge of the Criminal Court ordering his entry into prison. On 19 December 1998, the author requested the Constitutional Court in writing to suspend consideration of his *amparo* application, as his appeals were being considered by the Criminal Court and the Provincial High Court. The Constitutional Court did not reply. In a request lodged on 17 February 1999, the author applied for an extension of the *amparo* application after his appeals before the Criminal Court and the High Court had been rejected. Eight days later, he was notified of the decision of the Constitutional Court rejecting his *amparo* appeal.

2.11 Two months after he had been admitted to prison, the prison authorities placed Alfonso Ruiz Agudo in open detention, which meant that he had to sleep at the prison during the week and that his movements were restricted whenever he left the prison.

The complaint

3.1 The author claims that there was a violation by Spain of article 14, paragraph 1, of the Covenant on the grounds that both the Criminal Court and the High Court had allowed a custodial sentence to rest on documentary evidence arbitrarily produced by the prosecutor; and that the arguments contained in the legal explanation of the judgement handed down by the Provincial High Court against the accused were incompatible with the principle that the burden of proof rested with the accusing party, the very principle underlying the right to presumption of innocence.

3.2 The author also maintains that article 14, paragraph 3, of the Covenant was violated, since the criminal proceedings had lasted more than 15 years.

3.3 He also points out that there was no verbatim record of the statements of witnesses, experts, parties and counsel but only a summary drawn up by the clerk of the court, so that the proceedings, according to the author, lacked essential guarantees. Moreover, the accusing parties were at a clear advantage in the proceedings. He mentions article 790, paragraph 1, of the Criminal Procedure Act, maintaining that the rules of summary proceedings infringe the basic principle of equality of arms in judicial proceedings.

3.4 In a second communication, dated 27 August 1999, the author alleges the violation of article 7 of the Covenant, since an untimely sentence imposed after 16 years had elapsed between the events and effective punishment amounted to cruel, inhuman or degrading punishment. According to counsel, the sentence imposed on Alfonso Ruiz Agudo, after the statutory time limit had passed, was inhuman and incompatible with article 7 of the Covenant.

3.5 The author further maintains that there was a violation of article 10, paragraph 3, of the Covenant, which guarantees the right to a penitentiary system, the essential aim of which is the reformation and social rehabilitation of prisoners. He states that he is a model citizen, as shown in a report of the Guardia Civil of his home town. The sentence was intended instead to undermine his civic pride and to denigrate the accused personally, this being contrary to article 10, paragraph 3, of the Covenant.

The State party's observations on admissibility

4.1 In its communication dated 18 June 1999, the State party requests that the complaint relating to article 14, paragraph 1, of the Covenant be declared inadmissible, since on no occasion had the alleged victim complained before the domestic courts or Constitutional Court that his rights as guaranteed under article 14, paragraph 1, of the Covenant had been violated; nor had he complained of any lack of equality before the courts, a lack of publicly held proceedings or the lack of a competent, independent and impartial tribunal.

4.2 With regard to the violation of article 14, paragraph 3 (c), of the Covenant, the State party points out that the right to be tried without undue delay is a fundamental right under Spanish law. The State party explains in its communication that a violation due to the excessive length of proceedings may give rise to redress in substance and/or by compensation. In the case of the right to proceedings within a reasonable time, once the delay ends, redress in substance is no longer possible.

4.3 The State party explains that compensatory redress may be demanded in accordance with the procedure laid down in articles 292 et seq. of the Organization of Justice Act, consisting in a complaint against the abnormal functioning of justice brought before the Ministry of Justice; in the event of disagreement, application may be made for judicial review.

4.4 In this respect, the State party refers to a ruling of the Constitutional Court dated 29 October 1990, according to which "from a constitutional point of view, undue delays give rise to only one form of redress, namely the ending of the delays. Appealing on those grounds under the ordinary procedure and lodging an *amparo* application once they have ceased is pointless … Recognition that such delays have occurred …, be it for any other purpose than causing the delays to cease, should be sought by the person concerned through the appropriate administrative and judicial procedures" (*Prieto Rodríguez* case).

4.5 The State party maintains that it assumes responsibility for the rendering of justice within a reasonable time, regardless of whether any delay has been protested or not. It also points out that the criteria applied in domestic Spanish law to determine when the duration of a proceeding is unreasonable are those set forth by the European Court of Human Rights, whose jurisprudence is directly applicable in domestic Spanish law, as provided by article 10, paragraph 2, of the Constitution.

4.6 The State party points out that, when a complaint for unreasonable delay is lodged before the Strasbourg institutions in relation to proceedings that have already ended, that is to say, when there is no longer a possibility of redress in substance but only by way of compensation, the European Commission of Human Rights, by its ruling of 6 July 1993, has declared such complaints absolutely inadmissible in all cases on the grounds that domestic remedies have not been exhausted, since the remedy under the Organization of Justice Act has not been used.

4.7 In the case in question, undue delay has been alleged after the end of proceedings, when redress in substance no longer applies, but only redress through compensation. According to the State party, Alfonso Ruiz Agudo did not seek any compensatory redress for the alleged undue delay, but only the non-execution of the criminal proceedings.

4.8 With regard to the lack of verbatim minutes of the proceedings, as pointed out by counsel, the State maintains that there is no article of the Covenant requiring that court records be verbatim, nor does it see in what manner Ruiz Agudo was adversely affected by the fact that the record was not verbatim. Since on no occasion was that violation alleged in the course of domestic proceedings, it is not reasonable to object ex novo, five years after the trial, that the record of the proceedings was not verbatim.

4.9 The alleged victim maintains that the summary proceedings rules infringe the essential principle of equality of arms in judicial proceedings. According to the State party, it is unreasonable to complain about a "legal rule" without referring to which specific rights of the alleged victim guaranteed under the Covenant have been affected, and without ever having made the complaint earlier in domestic proceedings.

4.10 As far as the alleged violation of the presumption of innocence is concerned, the State party maintains that, in the actual documentation brought forward, there is ample incriminating evidence on which to found his conviction.

The author's comments on the State party's observations on admissibility

5.1 In his communication of 27 August 1999, the representative of the author maintains that, despite the State's contention that the author did not lodge a complaint for violation of the rights guaranteed under article 14, paragraph 1, of the Covenant in domestic proceedings, the application for *amparo* before the Constitutional Court demonstrates that there was a complaint of violation of his rights protected by article 24 of the Spanish Constitution, which recognizes the right to a fair trial and to the presumption of innocence. The State party's observation is therefore groundless.

5.2 With regard to the State party's argument that domestic remedies had not been exhausted, the author reiterates that the defendant sought recognition of his right to judicial proceedings without undue delay before the Constitutional Court, which in a ruling on 18 September 1996 said that, "with regard to recognition of the right to judicial proceedings without undue delays, constitutional jurisprudence has from the start required that a prior complaint should have been made regarding the delay, with explicit reference to the constitutional principle, and that the proceedings before the court should be under way (…), a condition that does not appear to have been met. Moreover, since a firm sentence has been pronounced, prior remedy must be sought through the appropriate channel". According to counsel, the author had not asked the Constitutional Court for compensation for the violation of his right to proceedings without undue delay. He had requested that the Court should recognize that the violation had taken place, thereby calling the State's attention to the infringement of a fundamental right. The requirement that a new judicial action should be initiated to seek "redress" is not consistent with the request brought before the Constitutional Court by the author. Furthermore, in accordance with article 5, paragraph 2, of the Optional Protocol, the rule regarding the exhaustion of domestic remedies does not hold when the application of the remedies is unreasonably prolonged.

5.3 With regard to the jurisprudence of the European Commission of Human Rights concerning the admissibility of cases relating to undue delays in judicial proceedings, counsel considers that it is in no way binding on the Committee. The author has exhausted the legal remedies in his country by appealing to the Constitutional Court and by being denied recognition as the victim of a violation of those rights on the grounds that he should have appealed as soon as the violation of the right to proceedings without undue delay had become apparent. The Committee notes that, in its fourth periodic report, Spain stated as follows: "Spanish law does not require a party to protest during the proceedings about their excessive duration. Consequently, irrespective of whether or not the party concerned has protested about the delay, the State has a responsibility to render justice within a reasonable time. And, as a consequence of that duty and responsibility, the State must compensate the party for the moral injury deriving from the non-performance of a State obligation and, as appropriate, the resulting material injury. For the purposes of such compensation, if there has been no declaration by a court or by the Constitutional Court concerning the excessive duration of proceedings, the General Council of the Judiciary shall report on the existence of such excessive duration and the Administration shall set the amount of compensation to be awarded to the victim."

5.4 As to the argument regarding the inadmissibility of the complaint concerning the lack of verbatim minutes, counsel maintains that the right of appeal is neither real nor effective if there are no verbatim minutes of the statements of witnesses and experts, since a second court cannot properly review what was decided by a court of first instance if it does not have a verbatim account before it. In his appeal, the accused requested that the value of the evidence should be reviewed on grounds of error. The lack of verbatim minutes meant that significant details of the statements made by witnesses and experts might have been omitted.

5.5 According to counsel, the author was placed at a disadvantage in the proceedings on account of the infringement of the right to equality of arms, owing to the fact that the criminal procedure was biased by law against him and in favour of the prosecutor and the accusing parties. The author's counsel points out that the accused had to forego the opportunities offered by article 790, paragraph 1, of the Criminal Procedure Act and was unable to present further evidence by, for example, again requesting that the original files of his accounts be produced, with which he could have demonstrated that he had not kept the money that he had been accused of misappropriating.

5.6 With regard to the State's observations concerning the complaint that the presumption of innocence had not been respected, counsel points out that the author was deprived of decisive evidence to prove his innocence, namely the original files of his bank accounts at the Caja Rural Provincial in possession of the private accusing party. One of the effects of the right to presumption of innocence is that the burden of proof should fall on the accusing party and that the accused should enjoy the benefit of the doubt. The ruling of the Provincial High Court recognizes that the burden of proving his innocence was placed on the accused when it said that "while there is no doubt that it would have been preferable to have the originals of the accounting transactions concerned, it would otherwise have been necessary to produce data or facts to challenge the reliability of the computer files". And yet the accused could only demonstrate his innocence by referring to his original accounting documents.

Decision on admissibility

6.1 At its seventy-first session, held in March and April 2001, the Committee considered the question of admissibility of the communication and ascertained, as it is required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.2 With regard to the allegation of undue delay, the Committee took note of the State party's reply to the communication, in which the State party claimed that domestic remedies had not been exhausted. The State party pointed out that, in July 1993, the European Court of Human Rights had declared all complaints of undue delay inadmissible on the grounds that domestic remedies had not been exhausted, if the remedy available under articles 292 et seq. of the Organization of Justice Act had not been used. However, the Committee took into account the fact that, in the case in question, proceedings had begun in 1983 and no judgement had been handed down until 1994, and that the State party did not substantiate the reason for the delay in its submission. The Committee concluded that, in the circumstances, the domestic remedies had been unreasonably prolonged under the terms of article 5, paragraph 2 (b), of the Optional Protocol and, consequently, that provision did not prevent it from examining the merits of the present communication.

6.3 With respect to the arguments put forward by the author of the communication that article 7 and article 10, paragraph 3, of the Covenant had been violated, the Committee considered that those claims had not been duly substantiated for the purposes of admissibility.

6.4 Consequently, on 15 March 2001, the Human Rights Committee declared the communication admissible insofar as it might raise questions related to article 14 of the Covenant.

The State party's observations on the merits of the communication

7.1 In its observations of 12 November 2001, the State party confirms that the proceedings against Alfonso Ruiz Agudo had been "excessively" long and that, in domestic legal proceedings, the Criminal Court had made a statement to that effect in its judgement of 21 December 1994. The State party therefore considers that, if the Committee were to state in its comments that there had been a violation of the right to be tried without undue delay, it would be repeating something that had been confirmed domestically.

7.2 With regard to the consequences of the delay, the author had entered an appeal to be given a minimum sentence of the shortest duration. According to the State party, his appeal had been heard by the Criminal Court, which had reduced the sentence to intermediate punishment of the shortest duration.

7.3 On the other hand, the State party notes that the author did not request the Constitutional Court to acknowledge the violation of the right to be tried without undue delay, as his counsel contends, but that the author requested the non-enforcement of the sentence. The State party argues that there was no legal basis for that petition, since neither Spanish law nor the Covenant provides for the non-enforcement of sentences in cases where the trial has been excessively long.

7.4 The State party reaffirms that, in this case, only financial compensation is possible. However, such compensation was never claimed by the author, and hence the State party does not understand why the Committee states that domestic remedies had been unreasonably prolonged in the terms of article 5, paragraph 2 (b), of the Optional Protocol. In this regard, the State party considers that, if the author had filed a claim for financial compensation in 1996 through the appropriate channel, of which he had been informed by the Constitutional Court, he would already have received such compensation.

7.5 With regard to the alleged violation of the presumption of innocence, the State party puts forward three counter-arguments.

7.6 First, the State party points out that Alfonso Ruiz Agudo was not convicted on the basis of computerized data alone, and this is borne out by the judgement handed down by the Criminal Court.

7.7 Secondly, the State party considers that the defence strategy of Alfonso Ruiz Agudo, in which he claimed that an office employee, one Alfonso de Gea Robles, was responsible for the offence, and yet did not ask to be acquitted but only to be given a minimum sentence of the shortest duration, constitutes an acknowledgement of criminal conduct on the part of the author.

7.8 Thirdly, with regard to the computerized record, the State party explains that bank operations are reflected in computerized records that cover all the daily transactions of the cash deposit machine and the cashier's department; those records were brought to the oral proceedings for examination. The State party emphasizes that the defence's own experts stated in the oral proceedings that they did not question the computerized transcription of the accounts.

7.9 In the light of that information, the State party points out that the judgement handed down by the Provincial High Court does not reverse the burden of proof. What it says is that the author is objecting to a legitimate piece of evidence that he did not challenge at the proper time, and that he should have contested it, adducing evidence in his favour against the incriminating evidence.

7.10 With regard to the records of the trial, the State party reiterates that no article of the Covenant requires the records of a trial to be verbatim. It also maintains that the author signed the records, together with his counsel, in full conformity with the procedure and that no complaint was ever made using domestic remedies.

7.11 Moreover, the State party maintains that no domestic complaint was made concerning the summary proceedings rules and the principle of the equality of arms, and the Covenant does not admit abstract reviews of the law.

The author's comments on the State party's observations on the merits of the communication

8.1 In his comments of 21 January 2002, the author's representative maintains that the right to be tried without undue delay is a duty of all the States which have signed the Covenant, and that the effective exercise of that right does not require a prior complaint from the accused. He therefore considers that the Constitutional Court's decision reflects a bureaucratic spirit in its explicit refusal to acknowledge the existence of a violation, on the pretext that the author had not previously complained to the intervening legal authorities.

8.2 Counsel argues that the double system of redress for undue delays referred to in the State party's submission is not effectively implemented. Redress for, and acknowledgement of, the violation must, because of their very nature, be made during the trial proceeding itself and not in a new administrative proceeding, which could last up to nine years - two years in a court of first instance and seven years with an application for judicial review. In view of the foregoing, the author's representative maintains that "legislation to prevent undue delays" should have been established that would, as a minimum, allow the judge in the same proceeding to draw up, having regard to the duration of the proceeding, an inventory of compensatory measures. Such measures should include: reduction of the sentence; exemption from serving the sentence; suspension of the prison sentence; or the right to directly quantifiable financial compensation, without needing to have recourse to another procedure.

8.3 Counsel points out that the Government refused to pardon Alfonso Ruiz Agudo in spite of a specific petition to that end from the author and the order for reparation under article 4, paragraph 4, of the Criminal Code. He further contends that the Constitutional Court should have acknowledged that a fundamental right had been violated and, consequently, suggested that the Government consider pardon as a means of providing satisfaction.

8.4 Concerning the reduction of the sentence granted by the Criminal Court, counsel explains that the author did not have a criminal record, and the judge could have imposed the minimum sentence. However, the judge imposed intermediate punishment of the shortest duration, so that the reduction of the sentence was purely illusory.

8.5 As regards the presumption of innocence, counsel reiterates that the decisive evidence for demonstrating the author's innocence was not an original document but an arbitrary reconstruction produced by the complainant. This evidence was later challenged by the author, who requested the original documents, which were not supplied by the bank. It is also pointed out that the Caja Rural de Cehegin did not have a computerized information system in 1983 and that the procedure for recording credits and debits was mechanical.

8.6 With regard to the personal testimony mentioned by the State party as other forms of proof, counsel affirms that such evidence pertains to other elements of the accusation, inconclusive points, such as the existence of multiple loans, which did not prove the author's guilt.

8.7 Counsel points out that the record of the trial states that Alfonso Ruiz Agudo never admitted to being guilty as charged. The record also shows that the experts acknowledged that they could not provide more information without having other pieces of evidence, such as Mr. Ruiz Agudo's accounts.

8.8 As to the equality of arms, counsel maintains that, while the State party pointed out that the author had not complained of this inequality in domestic remedies, it nevertheless concealed the existence of the judgement handed down by the Constitutional Court on 15 November 1990, in which the question of the unconstitutionality of this matter is rejected.

8.9 With regard to the record of the trial, the author's representative considers that the right of appeal requires, as a basic guarantee, that the court of higher instance have a verbatim record in which it can consult the details of the outcome of the trial and the evidence adduced. If there is only a summary record, no real appeal can be made on the basis of the facts of the case.

8.10 In his comments on 3 July 2002, the author's representative refers to a judgement handed down by the Criminal Division of the Court on 26 December 2000, which states that "the jurisprudence of this Division has clearly established that the ruling on the credibility of the statements that were made during the trial is a matter extraneous to the application for judicial review, since a determination can be made only by a court that directly heard such statements, that is, with its own senses and immediately". In this regard, according to counsel the court itself acknowledges that, without a verbatim record of all the statements made, there can be no real review in a higher court.

Consideration as to the merits

9.1 The Human Rights Committee has considered the present communication in the light of all written information made available to it by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol. The Committee notes that the State party has expressly confirmed that the trial of Alfonso Ruiz Agudo was excessively long, and that this was stated in the domestic legal remedies; however, the State party has given no explanation to justify such a delay. The Committee recalls its position as reflected in its general comment on article 14, which provides that all stages of judicial proceedings must take place without undue delay and that, to make this right effective, a procedure must be available to ensure that this applies in all instances. The Committee considers that, in the present case, a delay of 11 years in the judicial process at first instance and of more than 13 years until the rejection of the appeal violates the author's right under article 14, paragraph 3 (c), of the Covenant, to be tried without undue delay.[2] The Committee further considers that the mere possibility of obtaining compensation after, and independently of, a trial that was unduly prolonged does not constitute an effective remedy.

9.2 The Committee has taken note of the arguments presented by the parties concerning the evaluation of the documented incriminating evidence. The Committee refers to its jurisprudence and reiterates that, while article 14 guarantees the right to a fair trial, it is not for the Committee but for the domestic courts to consider the facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly biased, arbitrary or amounted to a denial of justice.[3] In the present case, the documents before the Committee do not demonstrate that the trial suffered from any such defect. The Committee also takes note of the State party's observations where it is argued that the author never maintained before the domestic courts that the evidence of the computerized records was unlawful, and notes that, according to the judgement handed down by the Criminal Court, several forms of evidence were taken into consideration with a view to establishing the facts. Consequently, the Committee concludes that there was no violation of article 14, paragraph 1, of the Covenant.

9.3 With regard to the absence of a verbatim record of the trial, the Committee finds that the author has not demonstrated in what way he was caused harm by the absence of such a document. Consequently, the Committee considers that there was no violation either of article 14, paragraph 1, or of the right of appeal provided for in article 14, paragraph 5.

9.4 Finally, the Committee takes note of the author's contention that the summary proceeding, in particular article 790 of the Criminal Procedure Act, infringes the principle of equality of arms. The Committee finds that the author, on the basis of the information and documentation submitted, has not substantiated his complaint for the purposes of determining that there was a violation of article 14, paragraph 1, in this respect.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it constitute violations by Spain of article 14, paragraph 3 (c), of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party has the obligation to provide an effective remedy, including compensation for the excessive length of the trial. The State party should adopt effective measures to prevent proceedings from being unduly prolonged and to ensure that individuals are not obliged to initiate a new judicial action to claim compensation.

12. Considering that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. It also requests the State party to publish these Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] Communications dated 12 March 1998 and 27 August 1999.

[2] See, for example, communications No. 614/1995, *Samuel Thomas v. Jamaica*; No. 676/1996, *Yasseen and Thomas v. Republic of Guyana*; and No. 526/1993, *Hill and Hill v. Spain*.

[3] See, for example, communications No. 634/1995, *Desmond Amore v. Jamaica*, and No. 679/1996, *Mohamed Refaat Darwish v. Austria*.

M. Communication No. 875/1999, *Jan Filipovich v. Lithuania*[*] (Views adopted on 4 August 2003, seventy-eighth session)

Submitted by:	Jan Filipovich (represented by counsel Lietuvos Respublikos Advokatûra Advokato K. Stungio Kontora)
Alleged victim:	The author
State party:	Lithuania
Date of communication:	25 January 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 August 2002,

Having concluded its consideration of communication No. 875/1999, submitted to the Human Rights Committee on behalf of Mr. Jan Filipovich under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 25 January 1997, is Jan Filipovich, a Lithuanian citizen convicted of premeditated murder. He claims to be a victim of a violation by Lithuania of article 14, paragraphs 1 and 3 (c), and article 15, paragraph 1, of the Covenant. He is represented by counsel. The Covenant and the Protocol entered into force for Lithuania on 20 February 1992.

The facts as submitted by the author

2.1 On 3 September 1991, the author and Mr. N. Zhuk got into a fight, following which Mr. Zhuk was found unconscious and taken to the hospital, where he was not operated on until 5 September and died that same day. According to the author, the causes of death were trauma to the abdominal cavity and peritonitis, which developed because of the delay in operating on Mr. Zhuk.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 The preliminary investigation began in September 1991. The author was convicted of premeditated murder by the Vilnius District Court on 16 January 1996.[1] The author appealed the decision in the same Court, which dismissed the appeal on 13 March 1996. On 2 May 1996, the Criminal Division of the Lithuanian Supreme Court rejected the author's application for judicial review. Subsequently, on 1 July 1996, the Vice-President of the Supreme Court and the Attorney-General of Lithuania refused to submit an application for judicial review.

The complaint

3.1 The author alleges that he is a victim of a violation of the right to a fair trial, as provided for in article 14, paragraph 1, because neither the preliminary investigation nor the oral proceedings were unbiased, since no importance was attached to the results of an investigation conducted by a commission set up to determine the reason for the delay in the surgical operation and the diagnostic error. The author states that, if the investigation's version of events was correct, the only possible charge that could have been brought was grievous bodily harm, not premeditated murder.

3.2 The author alleges a violation of article 14, paragraph 3 (c), of the Covenant because, although the investigation began in September 1991, he was not sentenced until 16 January 1996 and the final decision was handed down only on 2 May 1996, i.e. four years and eight months after the start of the proceedings. In his view, this constitutes undue delay.

3.3 The author alleges that there was a violation of article 15, paragraph 1, because the penalty imposed was heavier than the one that should have been imposed at the time the offence was committed. He states that, in 1991, the penalty for premeditated murder imposed by article 104 of the Lithuanian Criminal Code was 3 to 12 years' deprivation of liberty. He was, however, sentenced under the new article 104 of the Criminal Code, which provides for 5 to 12 years' deprivation of liberty, and he was given a term of 6 years. He also alleges that the court never stated either in its ruling or in subsequent decisions that he was convicted under the version of article 104 of the Criminal Code in force since 10 June 1993.[2]

The State party's observations on admissibility and the merits

(a) Alleged violation of article 14, paragraph 1, of the Covenant

4.1 With regard to article 14, paragraph 1, the State party draws attention to the Committee's case law and, in particular, the Views of 28 September 1999 relating to communication No. 710/1996 (*Hankle v. Jamaica*) and the Views of 9 April 1981 relating to communication No. 58/1979 (*Maroufidou v. Sweden*), which stated that it is generally for the domestic courts to review the facts and evidence in a particular case, unless it can be determined that the evaluation was clearly biased or arbitrary or amounted to a denial of justice.

4.2 The State party argues that the Lithuanian courts, i.e. both the court of first instance and the appeal court, as well as the Supreme Court, referred explicitly to the conclusions of the investigating commission. In particular, the Supreme Court held that the court of first instance had exhaustively investigated all the material circumstances of the case and had properly evaluated the evidence, according to the requirements of articles 18 and 76 of the Code of

Criminal Procedure.[3] The Supreme Court also reviewed the characterization of the offence under domestic law and determined that it had correctly been categorized as premeditated murder within the meaning of article 104 of the Lithuanian Criminal Code.

4.3 In the light of the foregoing, the case does not reveal any irregularity on the basis of which it may be concluded that there was an improper evaluation of the evidence or a denial of justice during the author's trial. Consequently, this part of the communication must be declared inadmissible under article 3 of the Optional Protocol because it is incompatible with the provisions of the Covenant.

(b) Alleged violation of article 14, paragraph 3 (c), of the Covenant

4.4 According to the State party, the author based his allegations only on the duration of the proceedings and did not put forward any other argument in support of his complaint. The duration of the proceedings cannot itself give rise to a violation of article 14, paragraph 3 (c), since the Covenant already explicitly provides for the right to be tried without undue delay. In addition to putting forward arguments in support of his complaint, the author must not only indicate exactly how long the proceedings lasted, but must also refer to the delays attributable to the State party and provide specific evidence.

4.5 The State party also argues that the author's calculations concerning the duration of the proceedings are not correct. Specifically, the start of the relevant period was not in September 1991, but on 20 February 1992, when the Covenant and the Optional Protocol entered into force for Lithuania.

4.6 Since the author has not provided information on undue delays during the criminal proceedings, the State party holds that the author has not substantiated his complaint and that, consequently, this part of the communication should be declared inadmissible under article 2 of the Optional Protocol.

(c) Alleged violation of article 15, paragraph 1, of the Covenant

4.7 The State challenges the author's contention that the lack of any specific reference to the relevant version of article 104 of the Penal Code in the sentence of the court of first instance indicates a violation of article 15, paragraph 1, of the Covenant. It recalls that the legality of the sentence was reviewed by the Lithuanian Supreme Court, which rejected the author's arguments that the court of first instance had imposed the wrong penalty, stating that the penalty was imposed in accordance with article 39 of the Criminal Code.[4] This article is in keeping with the principle that a law introducing heavier penalties is not retroactive. In recognizing the legality of the penalty imposed in accordance with article 39, the Supreme Court thus also confirmed that this penalty is in conformity with the principle of non-retroactivity provided for in article 7 of the Criminal Code.

4.8 The State party makes it clear that the Supreme Court also ascertained that there were no other reasons why the penalty imposed might have been regarded as heavier than the one which might legitimately have been imposed for this type of criminal offence in the specific circumstances of the case. In the present case, there was the aggravating circumstance that the author was drunk, but there were no mitigating circumstances. Article 104 of the Criminal Code, which was in force when the author committed the offence, provided for between 3 and 12 years' deprivation of liberty. The author was sentenced to a penalty of six years, well within the limits set in that article.

4.9 In view of the fact that the Supreme Court considered that the penalty imposed on the author was in keeping with article 39 of the Lithuanian Criminal Code and bearing in mind the Committee's case law stating that it is generally for the domestic courts to review the facts and evidence in a particular case, the State party maintains that the penalty imposed is in keeping with the prohibition on the imposition of a penalty that is heavier than the one that was applicable at the time when the offence was committed, as stated in article 15, paragraph 1, of the Covenant.

The author's comments relating to admissibility and the merits

5.1 In his comments of 20 August 2000, the author argues that, throughout the proceedings, his right to a defence and to be heard by a court were mere formalities, as clearly reflected in the court's decision.

5.2 The author's conviction by the Vilnius District Court on 16 January 1996 was based on the fact that the only reasons for Mr. Zhuk's death were the blows to his head and stomach which the author inflicted, thereby causing his death. According to the author, the court adopted these conclusions without any reliable evidence and without having examined the main evidence,[5] since the forensic report stated that the cause of Mr. Zhuk's death was a trauma to the stomach resulting in peritonitis. The medical report also stated that Mr. Zhuk was operated on too late, that the injuries which caused his death were not diagnosed until 30 hours after his arrival at the hospital and that the doctor, who suspected that there might be injuries to Mr. Zhuk's stomach, did not take the necessary measures to make a final diagnosis so that he might be operated on immediately.

5.3 With regard to article 14, paragraph 3 (c), the author agrees with the State party that the duration of the proceedings should be counted as from the entry into force of the Covenant, i.e. 20 February 1992, but, even then, the period would be too long because there were four years and two months between the entry into force of the Covenant and the date of 2 May 1996.

5.4 Bearing in mind that the evidence was collected during the initial stages of the investigation and that the forensic medical report was prepared on 6 September 1991 and, respectively, 1 December 1992, the only reason for such lengthy proceedings was the unjustified delay by the investigators in the case in bringing the author before the court.

5.5 Lastly, the author refers to article 15, paragraph 1, of the Covenant and states once again that he should have been tried in accordance with the law in force at the time when the offence was committed, whereas, in fact, the offences for which he was tried were not defined by the law in force when they were committed. The Vilnius District Court, which heard the case, took the view that the definition of the offence was in keeping with article 104 of the Criminal Code (premeditated murder), without taking account of the fact that article 111, paragraph 2, providing for the offence of grievous bodily harm resulting in death, existed at the time. The author also maintains that the penalty applicable for that type of offence was heavier than the penalty applicable at the time the offence was committed. He states that he disagrees with the State party's observation that, in its decision of 2 May 1996, the Supreme Court confirmed that the penalty was applied in accordance with the law in force at the time the offence was committed.

Issues and proceedings before the Committee

Consideration as to the admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol. It has further ascertained that the victim has exhausted domestic remedies for the purposes of article 5, paragraph 2 (b) of the Optional Protocol. The Committee also notes that the State party has not contested the admissibility of the communication under article 5, paragraphs 2 (a) and (b) of the Optional Protocol.

6.3 With regard to the author's allegations in respect of the violation of article 14, paragraph 1, the Committee recalls that it is generally for the courts of States parties, not for the Committee, to review the facts in a particular case. The Committee takes note of the State party's allegations that all of the evidence was examined by the Supreme Court. Moreover, the information available to the Committee and the author's arguments do not show that the evaluation of the facts by the courts was clearly arbitrary or amounted to a denial of justice. The Committee therefore takes the view that the complaint is inadmissible for lack of substantiation under article 2 of the Optional Protocol.

6.4 With regard to the author's allegations concerning articles 14, paragraph 3 (c), and 15, paragraph 1, of the Covenant, the Committee considers that these complaints have been sufficiently substantiated for purposes of admissibility. Accordingly, it will consider this part of the communication on the merits in the light of the information furnished by the parties, in conformity with the provisions of article 5, paragraph 1, of the Optional Protocol.

Consideration as to the merits

7.1 As to the author's allegations that the trial went on for too long, since the investigation began in September 1991 and the court of first instance convicted him on 1 January 1996, the Committee takes note of the State party's arguments that the duration of the proceedings should be calculated as from the entry into force of the Covenant and the Protocol for Lithuania on 20 February 1992. The Committee nevertheless notes that, although the investigation began before the entry into force, the proceedings continued until 1996. The Committee also takes note of the fact that the State party has not given any explanation of the reason why four years and four months elapsed between the start of the investigation and the conviction in first instance. Considering that the investigation ended, according to the information available to the Committee, following the report by the forensic medical commission and that the case was not so complex as to justify a delay of four years and four months, or three years and 2 months after the preparation of the forensic medical report, the Committee concludes that there was a violation of article 14, paragraph 3 (c).

7.2 With regard to the author's allegations that he was sentenced to a heavier penalty than the one that should have been imposed at the time the offence was committed, the Committee takes note of the author's allegations that none of the sentences against him explained which version of article 104 of the Criminal Code had been applied in imposing six years' deprivation of liberty. However, the Committee also notes that the author's sentence of six years was well within the latitude provided by the earlier law (3 to 12 years), and that the State party has referred to the existence of certain aggravating circumstances. In the circumstances of the case, the Committee cannot, on the basis of the material before it, conclude that the author's penalty was not meted out according to the law that was in force at the time when the offence was committed. Consequently, there was no violation of article 15, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee constitutes a violation of article 14, paragraph 3 (c), of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. The State party is also under an obligation to ensure that similar violations do not occur in future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Article 104 of the Criminal Code.

[2] The new Lithuanian Criminal Code entered into force in June 1993.

[3] Article 18 of the Code of Criminal Procedure provides that the court, the prosecutor, the investigator and the interrogator must take all of the measures provided for by law to investigate seriously and exhaustively all circumstances of a particular case and determine aggravating and mitigating circumstances, as well as incriminating and exculpatory circumstances. Article 76 of the Code of Criminal Procedure provides that the court, the prosecutor, the investigator and the interrogator must evaluate the evidence according to their own beliefs and on the basis of a serious and exhaustive examination of all the circumstances of the case, in accordance with the law and legal ethics.

[4] Article 39 of this Code explicitly states that the court in question must apply the penalty within the limits set by the article, specifying responsibility for the crime committed. The court must also take account of the nature and gravity of the offence and of aggravating or mitigating circumstances.

[5] According to the author, a forensic medical examination is compulsory in criminal proceedings, in accordance with article 86, paragraph 1, of the Code of Criminal Procedure, and is one of the main pieces of evidence (art. 74, para. 2, and art. 85, para. 3).

N. Communication No. 878/1999, *Kang v. Korea** (Views adopted on 15 July 2003, seventy-eighth session)

Submitted by:	Yong-Joo Kang (represented by counsel, Mr. Yong-Whan Cho)
Alleged victim:	The author
State party:	Republic of Korea
Date of communication:	27 May 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 July 2003,

Having concluded its consideration of communication No. 878/1999, submitted to the Human Rights Committee on behalf of Mr. Yong-Joo Kang under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 27 May 1998, is Mr. Yong-Joo Kang, a Korean citizen, in prison at the time of submission of the communication. He was subsequently released. He claims to be the victim of a violation by the Republic of Korea of articles 10, paragraphs 1 and 3, 18, paragraphs 1 and 2, 19, paragraphs 1 and 2, and 26 of the Covenant. He is represented by counsel. The Optional Protocol entered into force for the State party on 10 July 1990.

The facts as presented by the author

2.1 The author, along with other acquaintances, was an opponent of the State party's military regime of the 1980s. In 1984, he distributed pamphlets criticizing the regime and the use of security forces to harass him and others. At that time, he also made an unauthorized (and therefore criminal) visit to North Korea. In January, March and May 1985, he distributed dissident publications covering numerous political, historical, economic and social issues.

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 The author was arrested without warrant on 1 July 1985 by the Agency for National Security Planning (ANSP). He was held incommunicado and interrogated in ANSP detention, suffering "torture and other mistreatments", over 36 days. Under torture, he confessed to joining the North Korean Labour Party and receiving instructions for espionage from North Korea. Only on 5 August 1985, was a judicial warrant issued for his arrest. Remaining in detention, he was formally indicted on 4 September 1985 for alleged violations of the National Security Law of 31 December 1980.[1] These allegations encompassed meeting with another member of a spy ring, "enemy-benefiting activities" in favour of North Korea, gathering and divulging State or military secrets (espionage), and conspiracy.

2.3 In January 1986, the author was tried before the 10th Panel of the Seoul Criminal District Court for alleged violations of the National Security Law, as part of a spy ring case in which 15 persons were convicted in 1985 and 1986.[2] At trial, he contended that his confessions had been obtained by torture. On 20 January 1986, the court relied on the author's confessions, convicting and sentencing him to life imprisonment. The court found that he had "become a member of an anti-State organization", and that dialogue and meeting with other regime critics constituted a "crime of praising, encouraging or siding with the anti-State organization" and "crime of meeting with a member of the anti-State organization". The distribution of publications was said to amount to "espionage".

2.4 His appeals were successively dismissed by the 4th Criminal Panel of the Seoul High Court on 31 May 1986 and by the 1st Panel of the Supreme Court on 23 September 1986.[3] As he was convicted in 1986, he had no possibility to raise any constitutional issues before the Constitutional Court, which was only introduced by the 1987 Constitution.

2.5 After his conviction, the author was held in solitary confinement. He was classified as a communist "confident criminal"[3] under the "ideology conversion system", a system given legal foundation by the 1980 Penal Administration Law and designed to induce change to a prisoner's political opinion by the provision of favourable benefits and treatment in prison. Due to this classification, he was not eligible for more favourable treatment. On 14 March 1991, the author's detention regime was reclassified by the Regulation on the Classification and Treatment of Convicts ("the 1991 Regulation") to "those who have not shown signs of repentance after having committed crimes aimed at destroying the free and democratic basic order by denying it". Moreover, having been convicted under the National Security Law, the author was subject to an especially rigorous parole process.[4]

2.6 On 17 February 1992, the author and 41 other long-term political prisoners convicted under the National Security Law filed a constitutional petition with the Constitutional Court, seeking adjudication of the unconstitutionality of the "ideology conversion system" and its repeal. On 25 May 1992, the Court found the complaint time-barred. While conceding that the alleged violations had continuing effect, the Court considered that the complaint should have been brought within 180 days of the 1991 Regulation coming into effect on 14 March 1991.

2.7 In 1993, by Presidential Decree, the author's life sentence was commuted to 20 years' imprisonment. On 7 July 1994, the author filed a criminal complaint against eight officials of the ANSP concerning his "illegal arrest" and the mistreatment suffered in July and August 1985. The prosecutor decided not to indict the suspects of the ANSP as the relevant statute of limitation had already expired. This decision was subsequently upheld by the High Prosecutor's Office. On appeal, on 9 January 1995, the Constitutional Court confirmed the High Prosecutor's decision, holding the relevant seven-year time bar of the Code of Criminal Procedure to be applicable.

2.8 Following the inauguration of a new administration in 1998, on 25 February 1999 (after submission of the communication), the author was released under the terms of a general amnesty.[5]

The complaint

3.1 The author claims a violation of article 19, paragraph 2, in relation to his conviction under the National Security Law for his gathering and divulging of "State or military secrets" (espionage). His conviction was obtained by confessions extracted under torture during an illegal detention, while the information regarded as "secret" was publicly known. Due to the Supreme Court's interpretation of the notion of "secret" (see note 3, supra), the prosecution did not consider it necessary to establish that release of the information would threaten national security. It could scarcely be necessary for the protection of national security to censor ideas which were publicly known, and therefore the author's conviction and subsequent imprisonment fell outside the legitimate restrictions of article 19, paragraph 3.

3.2 He further claims a violation of articles 10, paragraphs 1 and 3, 18, paragraphs 1 and 2, 19, paragraph 1, and 26 in relation to the "ideology conversion system". The author was regarded as a "communist", a characterization he rejects. He was thus held in solitary confinement for 13 years for his refusal to "convert". The coercion to change his thought and conscience that he had suffered as a result of his classification and the withholding of benefits, as well as the absence of possible parole unless he "converted", amount to violations of his right to hold beliefs of his own choice, without interference. He was thus subjected to systematic discrimination on the basis of political opinion, and to treatment in prison which is neither compatible with his inherent dignity nor aimed at his reformation and social rehabilitation.

3.3 In support of his contention that the "ideology conversion system" violates the Covenant, the author refers to the Committee's concluding observations on the initial report of the Republic of Korea to the effect that:

> "… The Committee's main concern relates to the continued operation of the National Security Law. … Furthermore, some issues addressed by the National Security Law are defined in somewhat vague terms, allowing for broad interpretation that may result in sanctioning acts that may not be truly dangerous for State security and responses unauthorized by the Covenant. … The Committee also considers that the conditions under which prisoners are being re-educated do not constitute rehabilitation in the normal sense of the term and that the amount of coercion utilized in that process could amount to an infringement of the Covenant relating to freedom of conscience. …"[6]

3.4 The Special Rapporteur of the Commission on Human Rights on the promotion and protection of the right to freedom of opinion and expression has echoed these concerns. His report "strongly encourage[s]" the State party "to repeal the National Security Law and to find other means … to protect its national security". It further suggests that the State party cease "the practice of requesting prisoners who allegedly hold political opinions repugnant or unpalatable to the establishment to renounce such opinions", and recommends that "all prisoners who are held for their exercise of the right to freedom of opinion and expression should be released unconditionally" and that the "cases of prisoners who have been tried under previous Governments should be reviewed".[7]

3.5 The author further claims (without specifically referring to article 2) that the Constitutional Court's dismissal of his application concerning the "ideology conversion system" deprived him of an "effective remedy" for what the Court itself found to be a continuing violation of his rights.

3.6 The author seeks (a) declarations that his conviction for "espionage" and subjection to the "ideology conversion system" violate the relevant provisions of the Covenant, (b) immediate and unconditional release,[8] (c) repeal of the "ideology conversion system", (d) retrial of his case, (e) adequate compensation for the violation of the author's rights, and (f) official publication of the Committee's Views.

3.7 As to the admissibility of the communication, the author contends that he has exhausted all available domestic remedies and that he has no other effective remedy under the country's legal system with regard to the alleged violation of his rights. As to the applicability of the time bar (in both his petition to the Constitutional Court and the criminal proceedings initiated), the author argues that in both cases it was impossible under the unconstitutional military regime then in power to have brought a case against torturers of political dissidents within the period of limitations. The Korean legal order itself recognizes that the constitutional order was interrupted until February 1993,[9] and therefore the statute of limitations in his case ought to have run from that date.

3.8 As to the admissibility *ratione temporis* of the communication, the author states that he suffered continuing effects of his original conviction in violation of the Covenant past the entry into force of the Optional Protocol in the form of his prison term. The violations of the Covenant on account of the "ideology conversion system" are said to have been of an ongoing character and run up to his release.

3.9 The author confirms that the matter has not been submitted for examination under any other procedure of international investigation or settlement.

The State party's submissions on admissibility and merits

4.1 The State party, by submissions of 30 December 1999 and 22 June 2000, disputes the admissibility and merits, respectively, of the communication.

4.2 The State party considers the communication inadmissible on three grounds. Firstly, the author was released on 25 February 1999 pursuant to a general amnesty. Secondly, the "ideology conversion system" was abolished in June 1998, and replaced by an "oath of law-abidance system". This system does not operate by compulsion, but requests an oath from prisoners that they will abide by the law. The oath is not a prerequisite for release, as the release under the 15 August 1999 general amnesty without giving the oath of 49 persons convicted for violations of the National Security Law shows. Thirdly, "crimes of espionage and terrorist activities" for which the author was convicted "can by no means be justified by the right of freedom of expression". The State party argues that the author, a North Korean agent, sought to overthrow its Government, leaked State secrets to North Korea, engaged in "vicious anti-State terrorist activities under the instruction of North Korea" and plotted to destroy the American Cultural Center in Kwang-ju City "in order to fuel anti-American feelings amongst Korean people".

4.3 On the merits, the State party considers the communication unfounded for similar reasons. Firstly, it argues that the author's convictions for espionage and terrorist activities under North Korean instruction followed fair and open trials. Secondly, the State party refers to article 19, paragraph 3 (b), of the Covenant for the proposition that freedom of expression cannot justify such crimes. Thirdly, there was no substantiated coercion or cruelty in the prosecutorial interrogation, for the author himself admitted at trial that his confession was voluntarily and freely given.[10] Fourthly, the oath of law-abidance system following abolition of the "ideology conversion system" simply requests an oath of compliance with the law and thus does not restrict any rights to freedom of opinion or conscience. Fifthly, the State party again refers to the fact that the oath is not a prerequisite for release and that the author's release on 25 February 1999 was part of a general amnesty "aimed at facilitating national reconciliation". Finally, as the proceedings in the author's case were consistent with the Covenant, there is no basis for a retrial or compensation.

The author's comments

5.1 By letters of 11 February 2000 and 8 September 2000, the author rejects the State party's submissions on both admissibility and merits.

5.2 The author points out that, in legal terms, the "amnesty" provided to the author was merely a "suspension of execution of punishment" as provided for in article 471 of the Code of Criminal Procedure. Accordingly, the author was only conditionally released and liable to re-detention at any time, particularly if political circumstances change. The author contrasts this situation with the unconditional amnesties provided to former presidents involved in the 1980 military coup d'état and released the same day as the author, and do not face any possibility of future detention.

5.3 The author rejects the State party's suggestion that the "ideology conversion system" is fully abolished, referring to the similar character of the "law-abidance oath system". He cites the Committee's concluding observations on the Republic of Korea to the effect that the "oath requirement is applied, on a discriminatory basis, particularly to persons convicted under the National Security Law, and that in effect it requires persons to make an oath to abide by a law that is incompatible with the Covenant."[11]

5.4 The author invites the State party to substantiate the allegations that he was a North Korean agent, leaked State secrets to North Korea and engaged in "vicious anti-State terrorist activities". The author rejects as libellous the State party's allegation that he was involved in "plotting to blow up the American Cultural Center in Kwang-ju". He notes the issues surrounding his conviction for "terrorist activity" did not form part of his original communication, as he had confined himself to his conviction for "espionage". He therefore rejects the relevancy to the espionage conviction of the State party's submission, but would be prepared to show how he suffered torture and forced extraction of confessions at the hands of the ANSP and prosecutors on the terrorism charge as well, were the State party to advance evidence of his conviction for this crime. The author questions why the State party has not genuinely investigated the author's prolonged detention incommunicado, which constituted a serious crime under domestic law, as well as his subsequent detention pre-trial after issuance of the arrest warrant.

5.5 As to improper treatment at the pre-trial stage, the author points out that the prosecutors and judges singularly failed to investigate the prolonged period of unlawful detention and what may have occurred during that period. As to the voluntariness of the confessions and their subsequent use at trial, the author states that he was simply asked if he wished to return to the ANSP when he raised these issues.[12]

5.6 The author accepts as self-evident that espionage is not justified by the right to free expression, but contends that this begs the question of his conduct in the particular case. As outlined in the communication, the "State or military secrets" for which he was convicted were publicly available and did not pose any threat to the life or security of the State party. Accordingly, their dissemination was protected by article 19. It falls on the State party therefore to justify why the information for which he was convicted for gathering and divulging posed such a threat, and it has failed to do so. The author points out that under the National Security Law, the burden of proof falls on the individual to show that he did not pose a threat to State security, rather than on the State to show that he or she did pose such a threat.

5.7 Finally, the author notes that his release was conditional, and he remains a victim because he is under threat of re-detention based on the conviction. Moreover, the "ideology conversion system" continued to apply until his release. The Committee is asked to determine whether his status before and after release is compatible with the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol. With respect to the exhaustion of domestic remedies, the Committee notes that the State party has not claimed that there are any domestic remedies that have not been exhausted by the author.

6.3 As to the admissibility *ratione temporis* of the author's conviction for espionage, and the circumstances of alleged torture and unlawful detention preceding it, the Committee observes that these events occurred before the entry into force of the Optional Protocol for the State party. It recalls its jurisprudence that, in such circumstances, a term of imprisonment, without the involvement of additional factors, does not amount per se to a "continuing effect", in violation of the Covenant, sufficient to bring the original circumstances giving rise to the imprisonment within the Committee's jurisdiction *ratione temporis*.[13]

6.4 With respect to the remaining claims, the State party argues that the communication is deprived of object as the author has been released. The Committee observes that a communication could only be considered to be deprived of object and inadmissible if the State party had provided a full and effective remedy for the allegations brought before the Committee. In the present case, there is no indication that appropriate compensation for the alleged violations of the Covenant has been granted to the author. Accordingly, the Committee considers that the question whether an effective remedy has been provided can only be determined by addressing the merits of the case.

6.5 As to the State party's remaining objections, the Committee considers that they are in the nature of arguments on the merits which are most appropriately dealt with at that stage of its consideration.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 As to the author's claim that the "ideology conversion system" violates his rights under articles 18, 19 and 26, the Committee notes the coercive nature of such a system, preserved in this respect in the succeeding "oath of law-abidance system", which is applied in discriminatory fashion with a view to alter the political opinion of an inmate by offering inducements of preferential treatment within prison and improved possibilities of parole.[14] The Committee considers that such a system, which the State party has failed to justify as being necessary for any of the permissible limiting purposes enumerated in articles 18 and 19, restricts freedom of expression and of manifestation of belief on the discriminatory basis of political opinion and thereby violates articles 18, paragraph 1, and 19, paragraph 1, both in conjunction with article 26.

7.3 As to the author's remaining claims under article 10, the Committee considers that his detention in solitary confinement for a period as long as 13 years, of which more than 8 were after the entry into force of the Optional Protocol, is a measure of such gravity, and of such fundamental impact on the individual in question, that it requires the most serious and detailed justification. The Committee considers that confinement for such a lengthy period, apparently on the sole basis of his presumed political opinion, fails to meet that such particularly high burden of justification, and constitutes at once a violation of article 10, paragraph 1, protecting the inherent dignity of the author, and of paragraph 3, requiring that the essential aim of detention be reformation and social rehabilitation.

7.4 In the light of these findings, the Committee need not address the further claim under article 2 alleging a failure of the domestic courts to provide him with an effective remedy for the violations in question.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 10, paragraphs 1 and 3, and articles 18, paragraph 1, and 19, paragraph 1, in conjunction with 26, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The Committee notes that, although the author has been released, the State party is under an obligation to provide the author with compensation commensurate with the gravity of the breaches in question. The State party is under an obligation to avoid similar violations in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The Law was enacted by the "National Security Legislative Council", an unelected body organized as a legislature following the 1980 military coup d'état. Forming or joining an "anti-State organization", and espionage or other activities under instruction of an anti-State organization are punishable with heavy penalties under articles 3 and 4, respectively.

[2] In 1994, the Working Group on Arbitrary Detention of the Commission on Human Rights found, in the absence of a response from the State party, the imprisonment of two of these other individuals to be of arbitrary character. (E/CN.4/1994/27, at 95 et seq.)

[3] As to the crime of espionage, the Court's earlier jurisprudence had been as follows: "... *even though the information is self-evident and natural common sense knowledge* in the Republic of Korea, it shall be regarded as State secret [sic] under the National Security Law when it might provide benefit to an anti-State organization and might cause damage to us" [emphasis added].

[4] "Confident criminal" is not specifically defined, but appears from the context of the communication to be a prisoner who fails to comply with the ideology conversion system and its renunciation requirements (to which see below).

[5] Under the Parole Administration Law, in such cases, the Parole Examination Committee "shall examine whether the convict has converted the [sic] thought, and, when deemed necessary, shall request the convict to submit an announcement or statement of conversion".

[6] See, however, infra para. 5.2.

[7] CCPR/C/79/Add.6, 25 September 1992, at paras. 6-7.

[8] E/CN.4/1996/39/Add.1, 21 November 1995, at paras. 12-26, 46.

[9] In his later submissions after his release, the author confirms that he is liable to re-imprisonment and therefore maintains his claim for "unconditional" release with no such possibility.

[10] The author refers to the Seoul High Court's decision of 16 December 1996, convicting former Presidents Chun Doo-Hwan and Roh Tae-Woo for the coup d'état and massacre, that the "de facto rebellious situation" lasted until February 1993. Similarly, the 1995 Special Law on the Democratisation Movement of May 18 recognizes that the constitutional order was interrupted until 24 February 1993, and accordingly extended the limitation period for coup d'état crimes.

[11] See, however, supra, paragraph 2.3.

[12] CCPR/C/79/Add.114, 1 November 1999, para. 15.

[13] What the author means with this statement is unclear, however it would appear that it was suggested to the author that he could be returned to the ANSP for new interrogation if he continued to dispute the circumstances of the original one.

[14] See also *Baulin v. Russian Federation* Case No. 771/1997, Decision adopted on 31 October 2002.

O. Communication No. 886/1999, *Bondarenko v. Belarus** (Views adopted on 3 April 2003, seventy-seventh session)

Submitted by:	Natalia Schedko (represented by counsel, Mrs. Tatiana Protko)
Alleged victim:	The author and her son Anton Bondarenko (deceased)
State party:	Belarus
Date of communication:	11 January 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 2003,

Having concluded its consideration of communication No. 886/1999, submitted to the Human Rights Committee on behalf of Mrs. Natalia Schedko and Mr. Anton Bondarenko under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Ms. Natalia Schedko, a Belarusian national. She acts on behalf of herself and of her deceased son, Anton Bondarenko, also a Belarusian national, who at the time of submission of the communication, 11 January 1999, was detained on death row, having been convicted of murder and sentenced to death. She claims that her deceased son is a victim by the Republic of Belarus[1] of violations of articles 6 and 14 of the International Covenant on Civil and Political Rights. From her submissions, it transpires that the communication also raises issues under article 7 of the Covenant. The author is represented by counsel.

1.2 On 28 October 1999, in accordance with rule 86 of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur on new communications, requested the State party not to execute the death sentence against Mr. Bondarenko, pending the determination of the case by the Committee. As it transpired from the State party's submission of 12 January 2000 that Mr. Bondarenko's death sentence had been executed on an unspecified previous date, the Committee addressed specific questions both to the author and to the State party.[2] From the answers, it transpired that Mr. Bondarenko was executed in July 1999,[3] i.e. prior to the date of registration of the communication by the Committee.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

1.3 The Committee notes with regret that, by the time it was in a position to submit its rule 86 request, the death sentence had already been carried out. The Committee understands and will ensure that cases susceptible of being subject of rule 86 requests will be processed with the expedition necessary to enable its requests to be complied with.

The facts as submitted by the author

2.1 Mr. Bondarenko was accused of murder and several other crimes, found guilty as charged and sentenced by the Minsk Regional Court on 22 June 1998 to death by firing squad. The decision was confirmed by the Supreme Court on 21 August 1998. According to the courts' assessment of the facts, Mr. Bondarenko broke into a private house on 25 July 1997, in the company of a minor named Voskoboynikov, and forced the owners at knifepoint to open their safe. After having taken the valuables out of the safe, Mr. Voskoboynikov had warned Mr. Bondarenko that one of the house occupants, Mr. Kourilenkov, would report them, and suggested that Mr. Bondarenko kill him. Bondarenko had stabbed Mr. Kourilenkov twice in the neck with a pocket knife and then stopped. Mr. Voskoboynikov had continued stabbing Mr. Kourilenkov in the neck and body with his own knife. Kourilenkov's grandmother, Mrs. Martinenko was also killed when she opened the front door; she was pushed down the cellar staircase by Mr. Voskoboynikov, and then stabbed several times.

2.2 According to the author, forensic evidence concluded that Kourilenkov died of multiple wounds to the neck and body, with damage to the left jugular vein and the larynx, complicated by massive external bleeding and acute traumatic shock. In the author's opinion, the trial proved that Mr. Bondarenko had stabbed Mr. Kourilenkov only twice, which in the author's view could not have caused his death. With regard to the homicide of Mrs. Martinenko, the author considers that there was irrefutable evidence that Mr. Bondarenko was not guilty. Mr. Voskoboynikov allegedly had confessed, on 24 August 1998, that he lied during the investigation and in court, falsely accusing Bondarenko. He had earlier refused to reveal the whereabouts of the murder weapon - his knife, with which he had committed both murders - but now pointed out where it was hidden so that the case could be reopened and a further inquiry initiated.

2.3 The author states that the President of the Supreme Court refused even to add the knife to the case file, holding it did not constitute sufficient evidence in support of the claim that Mr. Bondarenko had not been involved in the murders. Thus the Court is said to have refused to place on file evidence in defence of the author's son which would mitigate his guilt and prove that he had not been actively involved in the murders.

The complaint

3.1 The author claims that the domestic courts did not have clear and unambiguous evidence that would have proven that her son was guilty of the murders. In her opinion, the President of the Supreme Court ignored the testimony of her son's co-defendant (given after the trial) and refused to include evidence that would have mitigated the guilt of her son. That is said to underline the preconceived attitude of the court with regard to her son, and such a court cannot be considered to be independent and impartial. In her opinion this constitutes a violation of articles 6 and 14 of the Covenant.

3.2 From the file, and although the author has not directly invoked these provisions, it also transpires that the communication may raise issues under article 7 of the Covenant, in relation to the denial of information to the author concerning the date of her son's execution and the place of his burial.

3.3 Finally, the communication appears to raise issues relating to the respect by the State party of its obligations under the Optional Protocol to the Covenant, as it is alleged that the State party executed the author's son prior to the registration of the communication by the Committee, but after she informed the lawyer, the penitentiary administration and the Supreme Court of the submission of the communication.

The State party's observations

4.1 By note of 12 January 2000, the State party submitted its observations, recalling that Mr. Bondarenko was tried and found guilty by the Minsk Regional Court on 22 June 1998 of all crimes specified under articles 89, 90, 96 and 100 of the Criminal Code of the Republic of Belarus.[4] He was sentenced to death and confiscation of his property. In the same judgement, Mr. Voskoboynikov was sentenced on the same charges to 10 years' imprisonment and confiscation of property.[5]

4.2 To the State party, the evidence in the case clearly demonstrated that Mr. Bondarenko and Mr. Voskoboynikov were guilty of armed assault against and aggravated homicide of Mrs. Martinenko and Mr. Kourilenkov.

4.3 According to the State party, although Mr. Voskoboynikov had denied involvement in the murders, the evidence proved his guilt. The investigation and the courts were satisfied that Mr. Bondarenko and Mr. Voskoboynikov had jointly perpetrated the murders of Mrs. Martinenko and Mr. Kourilenkov, and that they had both stabbed them. Thus Mr. Voskoboynikov's statement that he had lied during the investigation and the trial and falsely accused Bondarenko is without foundation.

4.4 The State party asserts that the courts' evaluation of Mr. Bondarenko's and Mr. Voskoboynikov's actions was correct. Having considered the nature of the crimes committed by Mr. Bondarenko, the great danger they represented to the public, and his motives and methods, as well as previous information that reflected negatively on the accused's personality, the court came to the conclusion that Mr. Bondarenko constituted a particular menace to society and imposed the death penalty.

4.5 According to the State party, all aspects of the case were thoroughly considered during the preliminary investigation and the court proceedings. Accordingly, there are no grounds for challenging the judgements.

4.6 The State party closes with the information that Mr. Bondarenko's sentence has been carried out, but provides no date.

Author's comments

5.1 In her comments of 29 January 2001, counsel refers to the State party's contentions that the courts had correctly characterized Mr. Bondarenko's and Mr. Voskoboynikov's actions and that the investigation and the courts had established that they had jointly murdered Mrs. Martinenko and Mr. Kourilenkov. Counsel points out, however, that forensic evidence concluded that Mr. Kourilenkov had died of multiple wounds to the neck and to the body, the left cheek and the larynx, combined with massive haemorrhage and acute traumatic shock. The courts had concluded that Mr. Bondarenko had stabbed Mr. Kourilenkov twice, which in counsel's opinion did not and could not have been the cause of death.

5.2 Counsel recalls that Mr. Voskoboynikov had admitted that he had acted alone in killing Mrs. Martinenko. The knife used to commit the murders had not been included in the file.

5.3 Counsel therefore concludes that the death sentence imposed on Mr. Bondarenko was in violation of article 6 of the Covenant. In any event, the sentence was carried out.

Additional observations from the author and the State party

6.1 After the Committee had sent a letter to the parties on 11 July 2002 with a request to provide information on the execution of the death sentence,[6] counsel submitted the following observations on 24 July 2002. She states that according to the author, the latter obtained a death certificate dated 26 July 1999, stating that her son was executed on 24 July 1999.[7] Counsel further declares that the death sentences are executed in secret in Belarus. Neither the condemned prisoner nor his family are informed of the date of the execution.[8] All those sentenced to capital punishment are transferred to the Minsk Detention Centre No. 1 (SIZO - 1), where they are confined to separate "death cells" and are given (striped) clothes, different from other detainees.

6.2 Counsel notes that executions take place in a special area by soldiers chosen from the "Committee for the execution of sentences". The method of execution is by firing with the executioner using a pistol. The pistol is handed by the chief of the Centre to the executioner. After the execution, a medical doctor establishes a record, certifying the death, in presence of a procurator and a representative of the prison administration.

6.3 Counsel further notes that the body of the executed prisoner is transferred at night-time to one of the Minsk cemeteries and buried there by soldiers, without leaving any recognizable sign of the name of the prisoner or the exact location of his burial site.

6.4 Counsel states that once the court which pronounced the death sentence is informed of the execution, that court then informs a member of the family of the executed prisoner. The family is thereafter issued a death certificate by the municipal civil status service, where the court decision is referred to as the cause of death.

6.5 Counsel asserts, without giving any further detail, that Mrs. Schedko had informed her son's lawyer, the Supreme Court and the prison authorities that she had submitted a communication to the Human Rights Committee before her son's actual execution.

7.1 On 12 September 2002 the State party replied to the Committee's request[9] concerning the date of the execution of the author's son, and the exact moment from which the State party was aware of the existence of the communication. It asserts that Mr. Bondarenko was executed on 16 July 1999, further to the decision of the Minsk Regional Court of 22 June 1998. It underlines that the Note of the Office of the United Nations High Commissioner for Human Rights concerning the registration of the communication was dated 28 October 1999, i.e. that the execution took place three months before the State party was informed about the registration of the communication under the Optional Protocol.

7.2 The State party has not offered further observations on the author's allegations.

Issues and proceedings before the Committee

Alleged breach of the Optional Protocol

8.1 The author has alleged that the State party breached its obligations under the Optional Protocol by executing her son despite the fact that a communication had been sent to the Committee and the author had informed her son's lawyer, the prison authorities and the Supreme Court of this measure, prior to her son's execution and the formal registration of her communication under the Optional Protocol. The State party does not explicitly refute the author's claim, stating rather that it was appraised of the registration of the author's communication under the Optional Protocol by note verbale of 28 October 1999, i.e., three months after the execution. In its earlier case law the Committee had addressed the issue of a State party acting in breach of its obligations under the Optional Protocol by executing a person who has submitted a communication to the Committee, not only from the perspective whether the Committee had explicitly requested interim measures of protection but also on the basis of the irreversible nature of capital punishment. However, in the circumstances of the current communication and in light of the fact that the first case in which the Committee established a breach of the Optional Protocol for the execution of a person whose case was pending before the Committee[10] was decided and published subsequent to the execution of Mr. Bondarenko, the Committee cannot hold the State party responsible for a breach of the Optional Protocol due to the execution of Mr. Bondarenko after the submission of the communication, but prior to its registration.[11]

Determination of admissibility

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

9.2 The Committee notes that the same matter is not being examined under any other international procedure and that domestic remedies have been exhausted. The conditions set forth in paragraphs 2 (a) and (b) of article 5 of the Optional Protocol are therefore satisfied.

9.3 The Committee has noted the author's allegations that the courts did not have clear, convincing and unambiguous evidence, proving her son's guilt of the murders, and that the President of the Supreme Court ignored the testimony of her son's co-defendant given after the trial and refused to include evidence which could have mitigated her son's guilt. In the author's opinion, this shows conclusively that the court had a preordained attitude as far as her son's guilt was concerned, and displays the lack of independence and impartiality of the courts, in violation of articles 6 and 14 of the Covenant. These allegations therefore challenge the evaluation of facts and evidence by the State party's courts. The Committee recalls that it is generally for the courts of States parties to the Covenant to review facts and evidence in a particular case, unless it can be shown that the evaluation of evidence was clearly arbitrary or amounted to a denial of justice, or that the court otherwise violated its obligation of independence and impartiality. The information before the Committee does not provide substantiation for a claim that the decisions of the Minsk Regional Court and the Supreme Court suffered from such defects, even for purposes of admissibility. This part of the communication is accordingly inadmissible pursuant to article 2 of the Optional Protocol.

9.4 The Committee considers that the author's remaining allegation, namely that the authorities' failure to inform, either through the condemned prisoner or directly, his family of the date of execution, as well as the authorities' failure to inform her of the exact location of the burial site of her son, amounts to a violation of the Covenant, is admissible insofar as it appears to raise an issue under article 7 of the Covenant.

9.5 The Committee thus declares the communication admissible to the extent outlined in paragraph 9.4 above and proceeds to the examination on the merits of this claim.

Consideration on the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee notes that the author's claim that her family was informed of neither the date, nor the hour, nor the place of her son's execution, nor of the exact place of her son's subsequent burial, has remained unchallenged. In the absence of any challenge to this claim by the State party, and any other pertinent information from the State party on the practice of execution of capital sentences, due weight must be given to the author's allegation. The Committee understands the continued anguish and mental stress caused to the author, as the mother of a condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his grave site. The complete secrecy surrounding the date of execution, and the place of burial and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' initial failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son's grave amounts to inhuman treatment of the author, in violation of article 7 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 7 of the International Covenant on Civil and Political Rights.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including information on the location where her son is buried, and compensation for the anguish suffered. The State party is also under an obligation to prevent similar violations in the future.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The International Covenant on Civil and Political Rights entered into force for the State party on 23 March 1976 and the Optional Protocol on 30 December 1992.

[2] The Committee requested on 11 July 2002 the following information:

(a) From the State party:

1. "When exactly the execution took place, and

2. At what time did the State party learn about the existence of the communication?"

(b) From the author:

1. "On what date the death sentence was carried out, and

2. Did you inform the State party of the submission of the communication to the Human Rights Committee before the registration of the case?"

[3] According to the author, her son was executed on 24 July 1999; the State party gives the date 16 July 1999.

[4] The State party did not, however, provide the text of the articles in question.

[5] The Court took into account the fact that Mr. Voskoboynikov was a minor at the moment of the crime.

[6] See note 2.

[7] See note 3.

[8] The author submits a copy of article 175 of the Belarusian Criminal Execution Code. It provides in particular that death sentences are executed by shooting. During the execution a

procurator, a representative of the prison where the execution takes place and a medical doctor are present. In exceptional cases, with the procurator's permission, the presence of other persons can be admitted. The medical doctor certifies the death, and a record is established to that effect. The prison administration is obliged to inform the Court which passed the sentence, and that Court informs one of the relatives of the executed. The body of the executed is not released for burial, and the place of the burial is not communicated to the family or the relatives.

[9] See note 2.

[10] Communication No. 869/1999, *Piandiong et al. v. The Philippines.*

[11] Communications Nos. 839/1998, 840/1998, and 841/1998, *Mansaraj et al. v. Sierra Leone*, *Gborie et al. v. Sierra Leone*, and *Sesay et al. v. Sierra Leone*, paragraph 5.1 et seq.; communication No. 869/1999, *Piandiong et al. v. The Philippines*, paragraph 5.1 et seq., and communication No. 580/1994, *Glenn Ashby v. Trinidad and Tobago.*

P. Communication No. 887/1999, *Lyashkevich v. Belarus**
(Views adopted on 3 April 2003, seventy-seventh session)

Submitted by:	Mariya Staselovich (represented by counsel, Mrs. Tatiana Protko)
Alleged victim:	The author and her son Igor Lyashkevich (deceased)
State party:	Belarus
Date of communication:	26 November 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 2003,

Having concluded its consideration of communication No. 887/1999, submitted to the Human Rights Committee on behalf of Mrs. Mariya Staselovich and Mr. Igor Lyashkevich under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mrs. Mariya Staselovich, a Belarusian national. She acts on behalf of herself and of her son, Mr. Igor Lyashkevich, also of Belarusian nationality, who at the time of submission of the communication, 26 November 1998, was detained on death row, having been convicted of murder and sentenced to death. She claims that her son is a victim of a violation of article 6 of the International Covenant on Civil and Political Rights by the Republic of Belarus.[1] From her submissions, it transpires that the communication also raises issues under articles 7 and 14 of the Covenant. The author is represented by counsel.

1.2 On 28 October 1999, in accordance with rule 86 of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur on new communications, requested the State party not to execute the death sentence against Mr. Lyashkevich, pending the determination of the case by the Committee. As it transpired from the State party's submission of 12 January 2000 that Mr. Lyashkevich's death sentence had been executed on an unspecified date, the Committee addressed specific questions to the author and to the State party.[2] From the answers, it appeared that Mr. Lyashkevich was executed on 15 March 1999, i.e. prior to the date of registration of the communication by the Committee.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

1.3 The Committee notes with regret that, by the time it was in a position to submit its rule 86 request, the death sentence had already been carried out. The Committee understands and will ensure that cases susceptible of being subject to rule 86 requests will be processed with the expedition necessary to enable its requests to be complied with.

The facts as submitted by the author

2.1 The author states that Mr. Lyashkevich was on 15 July 1997 sentenced by the Minsk City Court to death by firing squad. He was found guilty, with four other co-defendants, of illegally depriving one Mr. A. Vassiliev of his liberty, causing him physical suffering, and thereafter intentionally killing him on 25 June 1996. The Supreme Court upheld the judgement on 15 November 1997.[3]

2.2 The Minsk City Court found that a co-defendant of Mr. Lyashkevich, Mr. Alchevskyi, had decided to take revenge on Mr. Vassiliev, and that as the latter was being beaten, another of the accused, Mr. Dudkevich, poured petrol over him and Mr. Lyashkevich set fire to him. The author claims that Mr. Lyashkevich told her that he had had neither motive nor reason to do so, that he had neither stabbed Mr. Vassiliev nor set fire to him, and that his actions could not have been the cause of the victim's death. The author considers that there was no evidence that her son stabbed Mr. Vassiliev in the neck or strangled him. In her view, it was clear from the court file that her son was not directly involved in the murder.

2.3 The author then refers to the statements made by the other co-defendants and reiterates that there is no evidence that her son was actively involved in the crime. She contends that her son did not organize, and *could* not have organized the crime, a belief shared by the inhabitants of her village, who sent a letter to that effect to the President of the Republic, to no avail. She states that her son never admitted guilt and that he hoped to the end that the miscarriage of justice would be remedied, despite the fact that all judicial remedies had been exhausted.

The complaint

3.1 The author argues that the death sentence against her son was passed on the basis of purely circumstantial evidence. The Court had no clear and unambiguous proof that her son was guilty of the murder. In her opinion, this constitutes a violation of article 6 of the Covenant, but the context of her submission indicates that this allegation must be read in conjunction with article 14 of the Covenant.

3.2 From the file, and although the author has not directly invoked these provisions, it also transpires that the communication may raise issues under article 7 of the Covenant, in relation to the lack of information provided to the author concerning the date of her son's execution and the place of his burial.

3.3 Finally, the communication appears to raise issues relating to the respect by the State party of its obligations under the Optional Protocol to the Covenant, as it is alleged that the State party executed her son prior to the registration of the communication by the Committee, but after she informed the lawyer, the penitentiary administration and the Supreme Court of the submission of the communication.

The State party's observations

4.1 By note of 12 January 2000, the State party submitted its observations stating that Mr. Lyashkevich was tried and found guilty by the Minsk City Court on 15 July 1997 of all the crimes specified in articles 124 and 100 of the Criminal Code of the Republic of Belarus,[4] and sentenced to death. The Court found four co-defendants guilty and sentenced three of them to 15 years' imprisonment.[5]

4.2 Recapitulating the facts, the State party states that following a fight at around midnight on 25 June 1996, Mr. Lyashkevich and the four others abducted Mr. Vassiliev, a former official in the militia, and took him to a place near the Braslav lakes to kill him, using extreme violence in the process. Mr. Lyashkevich's guilt had been proven: he admitted that he had beaten Mr. Vassiliev together with the other accused. He had held him by the neck and, after he had been doused with petrol and set alight, had fed the fire with wood.

4.3 The State party refers to evidence presented on trial by the co-accused concerning the sequence of events on the night of the crime: how Mr. Vassiliev had been beaten and then taken to be thrown in the lake, and how, when that had proven to be impossible, they had further beaten him and then set him on fire.

4.4 The State party adds that Mr. Lyashkevich's guilt was also proven by the conclusions of forensic experts derived from the multiple injuries and internal and external damage to Mr. Vassiliev's body.

4.5 According to the State party, the Court considered all aspects of the case and reviewed them objectively. The conclusion that Mr. Lyashkevich was guilty was justified and his actions were correctly subsumed under the relevant articles of the Criminal Code. His punishment had been determined having regard to the actions committed and the negative information concerning his personality, as well as to the aggravating circumstances in which the crime was committed. The Supreme Court of the Republic of Belarus upheld the Minsk City Court's judgement on 14 November 1997. For the State party, there is no reason to question these judgements.

Author's comments

5.1 Although the State party's observations were duly transmitted to her and followed by several subsequent reminders, the author did not comment on the State party's submission. After another specific request to provide information on the execution of the death sentence was sent on 11 July 2002, the author's counsel made the following observations on 24 July 2002. Counsel states that the author's son was executed on 15 March 1999, according to the death certificate the author obtained on 5 May 1999. Counsel further declares that the death sentences are executed in secret in Belarus. Neither the condemned prisoner nor his family are informed of the date of the execution.[6] All those sentenced to capital punishment are transferred to the Minsk Detention Centre No. 1 (SIZO - 1), where they are confined to separate "death cells" and are given (striped) clothes, different from other detainees.

5.2 Counsel notes that executions take place in a special area by soldiers chosen from the "Committee for the execution of sentences". The method of execution is by firing with the executioner using a pistol. The pistol is handed by the chief of the Centre to the executioner. After the execution, a medical doctor establishes a record, certifying the death, in presence of a procurator and a representative of the prison administration.

5.3 Counsel further notes that the body of the executed prisoner is transferred at night-time to one of the Minsk cemeteries and buried there by soldiers, without leaving any recognizable sign of name of the prisoner nor the exact location of his burial site.

5.4 Counsel states that once the Court which pronounced the death sentence is informed of the execution, that Court then informs a member of the family of the executed prisoner. The family is thereafter issued a death certificate by the municipal civil status service, where the Court decision is referred to as the cause of death.

5.5 Counsel asserts, without giving any further detail, that Mrs. Staselovich had informed her son's lawyer, the Supreme Court and the prison authorities that she had submitted a communication to the Human Rights Committee before her son's actual execution.

Additional observations from the State party

6.1 On 12 September 2002 the State party replied to the Committee's request[7] concerning the date of the execution of the author's son, and the exact moment from which the State party was aware of the existence of the communication. It reiterates that Mr. Lyashkevich was executed on 15 March 1999, further to the decision of the Minsk City Court of 15 July 1997. It underlines that the Note of the Office of the United Nations High Commissioner for Human Rights concerning the registration of the communication was dated 28 October 1999, i.e. that the execution took place several months[8] before the State party was informed about the registration of the communication under the Optional Protocol.

6.2 The State party has not offered further observations on the author's allegations.

Issues and proceedings before the Committee

Alleged breach of the Optional Protocol

7.1 The author has alleged that the State party breached its obligations under the Optional Protocol by executing her son despite the fact that a communication had been sent to the Committee and the author had informed her son's lawyer, the prison authorities and the Supreme Court of this measure, prior to her son's execution and the formal registration of her communication under the Optional Protocol. The State party does not explicitly refute the author's claim, stating rather that it was appraised of the registration of the author's communication under the Optional Protocol by note verbale of 28 October 1999, i.e. seven months after the execution. In its earlier case law the Committee had addressed the issue of a State party acting in breach of its obligations under the Optional Protocol by executing a person who has submitted a communication to the Committee, not only from the perspective whether the Committee had explicitly requested interim measures of protection but also on the basis of the irreversible nature of capital punishment. However, in the circumstances of the current communication and in light of the fact that the first case in which the Committee established a breach of the Optional Protocol for the execution of a person whose case was pending before the Committee[9] was decided and published subsequent to the execution of Mr. Lyashkevich, the Committee cannot hold the State party responsible for a breach of the Optional Protocol due to the execution of Mr. Lyashkevich after the submission of the communication, but prior to its registration.

Determination of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the same matter is not being examined under any other international procedure and that domestic remedies have been exhausted. The conditions set forth in paragraphs 2 (a) and (b) of article 5 of the Optional Protocol are therefore satisfied.

8.3 The Committee has noted the author's allegation that the fact that her son's conviction and death sentence was based purely on circumstantial evidence, and that the Court had no clear evidence that her son was guilty of murder, amounts to a violation of article 14 of the Covenant, read in conjunction with article 6. This allegation challenges the evaluation of facts and evidence by the State party's courts. The Committee recalls that it is generally for the courts of States parties to the Covenant to review facts and evidence in a particular case, unless it can be shown that the evaluation of evidence was clearly arbitrary or amounted to a denial of justice, or that the court otherwise violated its obligation of independence and impartiality. The information before the Committee does not provide substantiation for a claim that the decisions of the Minsk City Court and the Supreme Court suffered from such defects, even for purposes of admissibility. This part of the communication is accordingly inadmissible pursuant to article 2 of the Optional Protocol.

8.4 The Committee considers that the author's remaining allegation, namely that the authorities' failure to inform, either through the condemned prisoner or directly, his family of the date of execution, as well as the authorities' failure to inform her of the exact location of the burial site of her son, amounts to a violation of the Covenant, is admissible insofar as it appears to raise an issue under article 7 of the Covenant.

8.5 The Committee thus declares the communication admissible to the extent outlined in paragraph 8.4 above and proceeds to the examination on the merits of this claim.

Consideration on the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes that the author's claim that her family was informed of neither the date, nor the hour, nor the place of her son's execution, nor of the exact place of her son's subsequent burial, has remained unchallenged. In the absence of any challenge to this claim by the State party, and any other pertinent information from the State party on the practice of execution of capital sentences, due weight must be given to the author's allegation. The Committee understands the continued anguish and mental stress caused to the author, as the mother of the condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his grave site. Complete secrecy surrounding the date of execution, and the place of burial and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' initial failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son's grave amounts to inhuman treatment of the author, in violation of article 7 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 7 of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including information on the location where her son is buried, and compensation for the anguish suffered. The State party is also under an obligation to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The International Covenant on Civil and Political Rights entered into force for the State party on 23 March 1976 and the Optional Protocol on 30 December 1992.

[2] The Committee requested on 11 July 2002 the following information:

(a) from the State party:

1. "When exactly the execution took place, and

2. At what time did the State party learn about the existence of the communication?"

(b) from the author:

1. "On what date the death sentence was carried out, and

2. Did you inform the State party of the submission of the communication to the Human Rights Committee before the registration of the case?"

[3] Further, following an extraordinary procedure, a request to the President of the Supreme Court to initiate a review was denied on 15 January 1998.

[4] The State party did not, however, provide the text of the articles in question.

[5] Proceedings against one of the accused were dropped as a result of his death.

[6] The author submits a copy of article 175 of the Belarusian Criminal Execution Code. It provides in particular that death sentences are executed by shooting. During the execution a procurator, a representative of the prison where the execution takes place and a medical doctor are present. In exceptional cases, with the procurator's permission, the presence of other persons can be admitted. The medical doctor certifies the death, and a record is established to that effect. The prison administration is obliged to inform the Court which passed the sentence, and that Court informs one of the relatives of the executed. The body of the executed is not released for burial, and the place of the burial is not communicated to the family or the relatives.

[7] See note 2.

[8] "Six months", according to the State party's own submission.

[9] Communication No. 869/1999, *Piandiong et al. v. The Philippines.*

Q. Communication No. 893/1999, *Sahid v. New Zealand*[*] (Views adopted on 28 March 2003, seventy-seventh session)

Submitted by:	Mohammed Sahid (represented by counsel Mr. John Petris)
Alleged victims:	The author, his daughter and his grandson
State party:	New Zealand
Date of communication:	28 August 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 2003,

Having concluded its consideration of communication No. 893/1999, submitted to the Human Rights Committee by Mr. Mohammed Sahid under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 28 August 1998, is Mohammed Sahid, a Fijian national, born 24 October 1945. He brings the communication on his own behalf, and on behalf of his daughter Jamila, a Fijian national resident in New Zealand, and his grandson Robert, born in New Zealand on 14 February 1989.[1] He alleges violations by New Zealand of articles 23, paragraph 1, and 24, paragraph 1, of the Covenant in the event of his removal to Fiji from New Zealand. He is represented by counsel. The Optional Protocol entered into force for New Zealand on 26 August 1989.

The facts as presented

2.1 In July 1988, the author arrived in New Zealand on a temporary visitor's visa to visit his adult daughter, Jamila, and her husband. His wife and four other children remained in Fiji. In February 1989, a son, Robert, was born to Jamila, and in March 1989 he applied for residence in New Zealand for himself, his wife and four children in Fiji. In June 1989, the application for residence was denied. After a series of extensions, the author's final temporary permit expired on 7 June 1991; from that point, he was unlawfully in New Zealand. In May 1992, his daughter and her husband divorced. On 30 November 1992, the author was served with a removal order under the Immigration Act. On 24 December 1992, the author appealed his deportation order to the Removal Review Authority ("the Authority"). In 1995, the author's daughter remarried, divorced, and then remarried again.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 On 31 May 1996, following various exchanges in the intervening period with the author's representative, the Authority dismissed the author's appeal. On 14 April 1997, the High Court, on further appeal, remitted the matter to the Authority for a rehearing. On 6 May 1997, Jamila's ex-husband died. On 18 September 1997, the Authority again dismissed the author's appeal against the removal order. On 29 April 1998, the High Court dismissed the author's appeal against the Authority's second decision. On 22 July 1998, the High Court denied the author's application for leave to appeal to the Court of Appeal. While these proceedings were continuing, the Minister of Immigration dismissed several appeals for special intervention on the basis of the matter being sub judice.

2.3 On 27 July 1998, the author's representative sought a special direction from the Minister of Immigration, exceptionally to allow him to remain in New Zealand. On 28 August 1998, the author petitioned the Human Rights Committee. On 9 September 1998, the Minister of Immigration declined the request for a special direction for lack of substance. On 9 June 1999, the author was arrested with a view to removal. On 10 June 1999, the High Court, on an application for interim relief to stay removal, directed that the author be released on bail while interviews would be undertaken. On 16 June 1999, following a humanitarian assessment, the authorities decided to proceed with removal. On 1 July 1999, the High Court dismissed the application for interim relief. On 2 July 1999, the author was removed to Fiji.

2.4 On 3 July 2000, the Minister of Immigration cancelled the author's removal order, which would allow him to apply in the usual fashion for a temporary or residence visa without waiting out the usual five-year period following removal.

The complaint

3.1 The author contends that his removal to Fiji would violate the rights of the alleged victims to the protection of the family, guaranteed in article 23, paragraph 1. He contends that he, his daughter and her son constituted a "family" for the purposes of article 23. He states that they have been living together for many years, and that the extended family is culturally important to him. He argues that protection of the grandson's rights implies that the author should stay with him in New Zealand, as international human rights law aims at maintaining the family unit and giving highest priority to the child's rights. He relies for these propositions on a decision of admissibility of the European Court of Human Rights[2] under article 8 of the European Convention on Human Rights and Fundamental Freedoms[3] and a report of the Australian Human Rights Commission.[4]

3.2 The author contends that at no time did he intend to evade the authorities and that during his time in New Zealand he was pursuing the remedies available to him under New Zealand's immigration legislation. It is stated that his daughter Jamila suffers from "a number of physical and emotional disabilities" and has a close emotional tie with her father. Further, it is stated that the author has, in recent years, developed a heart condition which has on occasion necessitated hospitalization.

3.3 As to article 24, paragraph 1, the author submits that his grandson, who has New Zealand nationality by virtue of his birth in New Zealand, is entitled to the same measures of protection as other New Zealand children. To expel the author, who is alleged to be a primary caregiver, on the basis of his lack of New Zealand nationality discriminates against the grandchild and violates his rights to be treated without discrimination as to race, national or social origin, or birth. In support of this argument, the author supplied a family therapist's report describing him as exercising an important parental influence over his grandson in view of the death of his biological father, and that therefore his removal should be reconsidered "on humanitarian and on economic grounds".[5]

The State party's submissions on admissibility and merits

4.1 By submissions of 10 November 2000, the State party disputes both the admissibility and the merits of the communication.

4.2 As to admissibility, the State party contends that there are domestic remedies still available to the author, that the communication invokes a right not covered by the Covenant, and that the communication is insufficiently substantiated, for purposes of admissibility.

4.3 As to exhaustion of domestic remedies, the State party notes that the author has been given leave to apply for visitor's and resident's permits (from Fiji) and has applied for the former. Should he be unsuccessful in applying for residence, rights of appeal and review would be available to him.

4.4 Secondly, the State party argues that the author's essential claim is that the author "should have been granted residence in New Zealand because one of his five adult children and a grandchild reside in New Zealand. In other words, the author is purporting to find, within the Covenant, a derivative right of non-nationals to permanent residence in a foreign country where family members are residents or citizens of that country". The State party argues that neither the Committee's previous jurisprudence,[6] nor analogous reasoning of the European Court of Human Rights,[7] place such a broad interpretation on articles 23, paragraph 1, and 24, paragraph 1. Accordingly, as the right relied upon does not exist within the Covenant, the claim should be dismissed as inadmissible *ratione materiae*.

4.5 Finally, the State party notes that the communication "baldly asserts [the author's] right to family life and the right of his grandchild to his care" and does not establish a breach of either right. It "states" that there is a violation of article 23, paragraph 1, while providing no evidence that the State party is failing to protect the rights of family or children, either generally or in the specific instance. Accordingly, to the State party, the claims have been insufficiently substantiated.

4.6 On the merits, the State party rejects a violation of either article 23, paragraph 1, or article 24, paragraph 1.

4.7 The State party notes that the obligation under article 23, paragraph 1, is an "institutional guarantee",[8] whereby the State is obliged within broad discretion to protect positively the family unit. The State party lists numerous areas of its law where the family is institutionally recognized and protected. It notes that while there is no single definition of "family" under New Zealand law, the greatest protection is accorded to "nuclear" or "immediate" family groups comprising one or more adults, and any dependent children. The State party notes that this kind of family group, rather than the present group, was at issue in the *Yeung* report.[9]

4.8 In the immigration context, the State party observes that its law and policy provides extensive recognition and protection for family groups: (i) residence policy has a specific "family" category for foreign family members, (ii) overseas family members may be granted visitor permits, (iii) residence policy has a "humanitarian" category applicable to family members, (iv) family considerations are relevant to the issue of exceptional permits, (v) family and welfare considerations are assessed in appeals against removal order, and before a removal order is executed.

4.9 The State party points out that different forms of family relationship are protected to differing degrees, so that, for example, couples or adults with dependent children are accorded greater protection than family relations between adult children and their parents, or between adult siblings. These differences reflect objective assessments of the degree of interdependence in different family relationships. Thus, for example, as aged parents are more likely to be dependent on adult children for support, it is easier for a parent to join an adult child in New Zealand than for another adult sibling of the child to do so. These policy distinctions are consistent with the broad requirements of article 23, are justified by objective criteria, and are in line with the State party's discretion as to how best to protect and promote the family unit.

4.10 The State party notes that the author's application for residence and subsequent appeal against removal have both been considered in accordance with its law and policy. His family circumstances, including the interests of his daughter and grandson, as well as those of his wife and four children resident in Fiji, were given extensive and repeated consideration.[10]

4.11 The State party submits that the obligation to afford institutional protection does not give rise to an overriding obligation to protect all "families", however defined, in all circumstances. Rather the obligation must be balanced against other considerations, including, in this instance, the author's other family relationships. The situation is thus similar to that considered in *Stewart v. Canada*, where the Committee held:

> [T]he interference with Mr. Stewart's family relations that will be the inevitable outcome of his deportation cannot be regarded as either unlawful or arbitrary when the deportation order was made under law in furtherance of a legitimate State interest and due consideration was given in the deportation proceedings to the deportee's family connections. There is therefore no violation of articles 17 and 23 of the Covenant.[11]

4.12 The communication thus fails to demonstrate how New Zealand law falls short of the general obligation in article 23, paragraph 1, to protect and promote a family unit in New Zealand society.

4.13 The State party observes that it is unclear why the author's counsel has not expressly referred to article 17, paragraph 1, of the Covenant. Should article 17 nonetheless be considered relevant in the circumstances, the State party argues that article 17 prohibits "unlawful" or "arbitrary" interference with the family, accordingly not absolutely banning any interference but requiring that it be according to law, reasonable, proportionate and consistent with the Covenant.[12] In the context of immigration, therefore, the State party refers to the Committee's jurisprudence that there can be no overall obligation on a State party to respect the choice by a family of a particular country of residence.[13] The jurisprudence of the European Court has also held, consistently, that there is no general obligation to respect the choice by married couples of the country of their matrimonial residence,[14] and that States are entitled to balance family interests against their legitimate interests in controlling their borders.[15]

4.14 This concept of balance has been recognized by the State party's courts, which have emphasized the need to give due consideration to the interests of families and children in accordance with the Covenant.[16] The State party's residence policy, under which the author applied, provides for a wide range of circumstances in which strong family ties in New Zealand give rise to residence entitlement. The State party's law and policy recognize however the necessity, respected under international law, of retaining some limitations on entry and residence. In determining this policy, the State party observes it is entitled to distinguish amongst family relationships it regards as most compelling on the basis of objective factors.

4.15 Turning to the specific case in terms of article 17, the State party first observes that the author is a member of a variety of family groupings, including his relationship with his daughter Jamila and his grandson. The State party submits that his own primary family unit properly comprises, in addition to himself, his wife, son and three daughters in Fiji. While he clearly has an important relationship with his daughter, it must be recognized that she is an adult woman, who left Fiji, and has established a new life in New Zealand, having married, had a child, and now remarried. Her marriage is also strongly relevant to any consideration of the author's relationship with her and her child. As noted above, the State party submits it may accord the relationship between the author and his daughter, her husband and son a more limited weight than that between the author and his wife and other four children.

4.16 Secondly, the State party contends that the author has not demonstrated how any State action has interfered with his family life. While his family members are now spread between Fiji and New Zealand, that was the result of his daughter's decision to leave and establish herself in New Zealand. While he may have become closer to his daughter and grandson in New Zealand, it should be recalled that his initial purpose was to visit his daughter briefly, and that much of his subsequent stay there was permitted to allow him to exercise appeal rights. Throughout that time, all but one member of his immediate family remained in Fiji and his primary family relationship must be taken as being there. Further, regular contact with his New Zealand family remains possible. Aside from the possibility of a visitor permit for him to visit New Zealand, and of mail and telephone, they may return to or visit him in Fiji. While this contact may be more intermittent than the author may wish, it does not fall to the State party to reconstruct a family relationship disrupted by his daughter's decision to leave Fiji.

4.17 Even if the Committee considered that there had been interference with the author's family within the meaning of article 17, the State party submits that it was justified, being lawful and reasonable. There is no question that the decisions to decline his residence application and appeals against removal were taken according to applicable law and policy. Within these processes, extensive consideration was given to family/humanitarian circumstances.

4.18 The author's initial residence application was considered under the family and humanitarian categories. The denial was twice confirmed by the Minister, who invited him by interview to raise further circumstances. Once his temporary permits expired, the Authority considered whether there were "exceptional circumstances of a humanitarian nature" warranting cancellation of the removal order.

4.19 The Authority found, as to the medical condition of his daughter Jamila, there were facilities both in New Zealand and Fiji providing good treatment, and, if she returned to Fiji, there would be "greater family support" for her. While some emotional distress would occur upon separation, there was no serious resulting physical harm. As to her threat to commit suicide if the author was removed, this was accepted as evidence of her emotional vulnerability and need for support, and she was urged to seek counselling. As it was open to her to travel to Fiji with her husband, however, this could not of itself justify the author remaining in New Zealand.

4.20 The Authority also found, as to the author's allegations of delay in resolving the author's applications and appeals, the delays were principally due to the author's exercise of all available rights of appeal. Further, in the context of certain political and economic marginalization of Indians in Fiji, the author eight years earlier had had a window broken and Jamila suffered a theft. While unpleasant and worthy of sympathy, these instances did not show he would personally be at risk of harm, discrimination or marginalization in the event of removal.[17] Finally, accepting that family support was important in determining the best interests of the child and its development, the primary responsibility lay with the parents. This was not a case where a child was being involuntarily separated from its parents.

4.21 On appeal to the High Court, the author challenged these conclusions and the Authority's failure to consider a letter detailing his medical condition received two days before the decision was delivered. The Court considered the Authority had properly interpreted the facts and the law, and that, while the Authority had been unable to consider the letter, it had addressed the question of the author's health. It further noted that the author could not complain that the Authority had not considered the letter when he had had the best part of a year to place the information in question before the Authority. Thereafter, upon an application for judicial review against the Immigration Service for the decision to deport him, the High Court held that the Service had fully and properly considered the various humanitarian matters arising.

4.22 The State party observes that the decision to remove the author was fully consistent with the aims and objectives of the Covenant. The decision makers at each level, including the Immigration Service, the Authority, the High Court and the Minister independently considered relevant international instruments, as the domestic courts have emphasized must occur.[18] According to the State party, as the Committee has recognized, human rights principles must be balanced against rights of States, recognized under international law, to exclude aliens, admit aliens subject to conditions, or expel aliens.[19] To the extent that the author seeks to challenge the application of its immigration law and policy, the State party invites the Committee to follow its previous jurisprudence that it will not entertain reconsideration of domestic law unless there are indications of bad faith or abuse of power, neither of which have been suggested in the present case.[20]

4.23 As to the claim under article 24, paragraph 1, the State party notes that this provision imposes a comprehensive duty to guarantee measures of special protection to children within its jurisdiction, within a broad discretion as to how this is implemented by the State. The State party refers to extensive protection of children, both generally, and in the immigration context, where children's interests are considered at all stages of proceedings.

4.24 As to the contention that the grandson has suffered discrimination, the State party observes that the claim appears to be that the complaint is that the *grandfather*, not his grandson, has been treated differently on the basis of national or social origin. In any case, issuance of a removal order occurred because of the application of ordinary immigration criteria, applicable to all persons in such a situation, regardless of nationality.

4.25 Further, if it were directed against the grandson, the discrimination prohibited by article 24 would have to refer to differentiation on the basis of a child's *own* characteristics. As a New Zealand citizen, Robert is entitled to the protection of the law regardless of his national or social origin. Nor was he discriminated against in comparison to other children whose grandparents, who were not New Zealand residents, have not been removed. In those cases, exceptional factors militating against removal were present, which factors were found not present in the instant case. In particular, the circumstances in the *Yeung* case cited by the author are significantly different.[21] The relationship there between an infant child and his parents is quite different to the relationship between a child and a grandparent. In any event, the concerns raised by the Commission in that case were in fact taken into account in the present proceedings. Finally, any differentiation the Committee may find would be justified by objective, reasonable and proportionate grounds - as already described, the denial of residence to the author reflected a careful balancing of family circumstances.

The author's comments

5.1 By letter of 7 December 2000, the author rejects a number of the State party's arguments on admissibility and merits. He emphasizes that, at the point of submission of the communication, all domestic remedies were exhausted and indeed he was removed shortly thereafter. As to subsequent events, while the author was given leave to apply for a visitor's permit, this was then denied. No appeal lies against denial of a visitor's permit. As to admissibility *ratione materiae*, the author argues that his claims relate specifically to articles 23 and 24 of the Covenant. He contends that his allegations are properly substantiated.

5.2 As to the merits, the author argues under article 23, paragraph 1, that the interference in question was not reasonable and proportionate, for New Zealand immigration law and policy did not provide for the author's migration to New Zealand even though he had a daughter and grandson there. Accordingly, it provides little if any recognition to extended family relationships common in cultures such as his own, which "raises a preliminary question whether those policies are discriminatory on the basis of race or ethnic origins". The author regards it as "simplistic" to reduce his situation to a father, daughter, grandson relationship, as this does not consider Jamila's "isolation" in New Zealand, nor the rights of New Zealand citizens. The author suggests that relocation to Fiji is "unrealistic".

5.3 The author argues that with his removal "strong family bonds have been severed and this has had a greatly adverse effect on Robert". He attaches reports by a family therapist dated 29 June 2000 and 1 September 2000, on behavioural problems caused, in the therapist's opinion, by immigration decisions concerning the author.[22]

5.4 As to proceedings in the domestic courts, the author argues that his appeal was in terms of whether exceptional circumstances of a humanitarian nature existed. According to the author, the courts have consistently held that normal family ties cannot be considered exceptional circumstances. He argues that while the concept of balance has been judicially recognized, there is no developed doctrine of proportionality under New Zealand law. While the author accepts that immigration procedures now require the consideration of international conventions, he rejects the Authority's decision in his case as unreasonable. He further contends that superior courts do not enter into the merits of a humanitarian appeal, but confine themselves to an assessment of law and are "almost illusionary" [sic] remedies.

5.5 As to article 24, paragraph 1, the author argues that his function as a primary caregiver was of little consequence under the family/humanitarian aspects of the State party's residence policy, as his application was denied. As to alleged discrimination, he considers the basis for the differentiated treatment is the author's national or social origin.

Supplementary submissions by the parties

6.1 By submission of 16 July 2001, the State party provided supplementary submissions. The author's application for a visitor visa had been declined because of a high risk of non-compliance with visa conditions. He has however not yet applied for a residence visa despite being invited to do so. The author's wife has been issued an eight-week temporary visa to allow her to assist her daughter following medical treatment.

6.2 As to the author's claim advanced in his comments on the State party's submissions that its immigration policy may be discriminatory, the State party regards it "plainly inappropriate" to advance such an allegation not addressed in the communication. Nonetheless, the author's failure to acquire residence reflects the application of residence policy to his case rather than any deficiency in the policy. Further, immigration policy *does* make provision for extended relationships, and, to the extent that there are differentiations between various forms of family relationship, such distinction is consistent with the Covenant.

6.3 The State party rejects the author's claim that the superior courts only review questions of law and therefore provide "almost illusory" remedies. It notes that the author's case has been considered repeatedly in accordance with legislation and policy that is mindful of, and consistent with, international obligations. While the courts may be generally reluctant to reconsider findings of fact made in such decisions, such review gives careful consideration to compliance with law and policy, including consideration of international obligations.

6.4 The State party observes that the issue of the mental health of the grandson and the psychological reports were first raised in the author's comments on the State party's submissions, and were not drawn to the attention of any domestic authority. It would be open to the author to seek entry to New Zealand on humanitarian grounds by reference to the mental health of his grandchild.

6.5 The State party observes that the author's assertion that he was his grandchild's primary caregiver was not accepted as a matter of fact by the domestic authorities. The author's remarks on this and other questions of fact seek to revisit factual questions already considered by the domestic authorities.

6.6 Finally, as to the author's contention that there is no statutory requirement to consider the importance of the family or the Covenant, the State party observes that this overlooks the legally binding requirements, established by immigration policy as well as judicial precedent, for officials, tribunals and courts to take into account family circumstances and international human rights obligations.

6.7 By letter of 15 August 2001, the author stated that he has no further comments to make. On 20 December 2001, he forwarded a therapist's letter recommending the grant of a temporary visa to any family member able to make a brief visit to New Zealand in order to assist with Robert.[23]

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

7.2 As to the admissibility of the claims brought by the author on behalf of his adult daughter and grandson, the Committee refers to its consistent jurisprudence that an individual must show compelling grounds for bringing a communication on behalf of another in the absence of authorization.[24] The Committee notes that the author has not supplied any authorization from his adult daughter, or otherwise demonstrated why it would be appropriate to act on her behalf. It follows that the author does not have standing, in terms of article 1 of the Optional Protocol, to present a claim under article 23, paragraph 1, on behalf of his adult daughter, Jamila. As to the claim on behalf of his grandson Robert under article 24, paragraph 1, the Committee considers that, in the absence of special circumstances not demonstrated in the present case, it is inappropriate for the author to bring a claim on behalf of his grandson without expression of assent to such a course by a custodial parent.[25] Accordingly, the Committee considers that the author does not have standing in terms of article 1 of the Optional Protocol in respect of his daughter and his grandson, and these claims are inadmissible.

7.3 As to the author's own claim, the Committee notes the State party's arguments with respect to exhaustion of domestic remedies that it had become open to the author, after his removal, to apply for a residence permit which would enable him to return to New Zealand, and that he had not done so. The Committee observes that this opportunity only became available as a result of the (purely discretionary) decision of the Minister to cancel the removal order, after the author's removal had in fact taken place, and further that the author's application for a visitor's permit which also became possible after the Minister's decision has been declined. In the circumstances, the Committee does not regard the remedy advanced by the State party as being demonstrably effective, such as would preclude the Committee by article 5, paragraph 2 (b), of the Optional Protocol from considering the communication.

7.4 As to the State party's argument that the communication is insufficiently substantiated and/or outside the scope of the Covenant, the Committee refers to its previous jurisprudence[26] that issues of removal of persons to another jurisdiction in the immigration context may arise under the articles pleaded by the author. The Committee accordingly finds that there is sufficient information before it raising an arguable claim concerning the author in terms of article 23, paragraph 1, of the Covenant.

7.5 In the absence of any further obstacles to admissibility, therefore, the Committee finds the communication admissible insofar as the alleged violation of the author's right under article 23, paragraph 1, of the Covenant is concerned.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 As to the admissible claims under article 23, paragraph 1, the Committee notes its earlier decision in *Winata v. Australia*,[27] that, in extraordinary circumstances, a State party must demonstrate factors justifying the removal of persons within its jurisdiction that go beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness. In *Winata*, the extraordinary circumstance was the State party's intention to remove the parents of a minor, born in the State party, who had become a naturalized citizen after the required 10 years' residence in that country. In the present case, the author's removal has left his grandson with his mother and her husband in New Zealand. As a result, in the absence of exceptional factors, such as those noted in *Winata*, the Committee finds that the State party's removal of the author was not contrary to his right under article 23, paragraph 1, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any of the articles of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The author, acting on his own, provides no authorization or other justification for bringing the communication on behalf of the two latter individuals: see further paragraph 7.3.

[2] *Uppal v. United Kingdom* 3 EHRR 391 (1979) held admissible, and subsequently resolved by friendly settlement.

[3] Article 8 of the Convention provides: "Everyone has the right to respect for his private and family life, his home and his correspondence."

[4] Human Rights Commission Report No. 10: "The human rights of Australian-born children: a report on the complaint of Mr. and Mrs. R.C. Au Yeung" (January 1985). The Commission found it "inconsistent with and contrary to human rights" to deport two parents, who being unlawfully present in Australia had a year earlier had a child born to them, in circumstances where the child, an Australian national by virtue of birth there, had no option but to leave with the parents.

[5] Report dated 13 January 1999, by Julie Patterson, Senior Family Therapist.

[6] *Stewart v. Canada* (Case No. 538/1993, Views adopted on 1 November 1996).

[7] In *Abdulaziz v. United Kingdom* (1995) EHRR 471, the Court held, at paragraph 68: "The duty imposed by article 8 [of the Convention] cannot be considered as extending to a general obligation on the part of a contracting State to respect the choice by married couples for the country of their matrimonial residence and to accept the non-national spouses for settlement in that country."

[8] Nowak, M.: CCPR Commentary (Engel, 1993), at 290 and 402.

[9] See note 4, supra.

[10] The State party notes that between July 1989 and July 1999, the author pursued or was accorded more than 20 opportunities to make further submissions on these matters and to seek review of the decisions to deny him residence and to remove him. His requests for residence and/or appeal against removal were considered three times by the Immigration Service, twice by the Removal Review Authority, once by the Ombudsmen, six times by the Minister, and four times by the High Court.

[11] Op. cit., at para. 12.10.

[12] General comment 16 on article 17.

[13] *Aumeeruddy-Cziffra v. Mauritius* (Case No. 35/1978, Views adopted on 9 April 1981).

[14] *Abudulaziz*, op. cit., at 497-498, *Gul v. Switzerland* (1986) 22 EHRR 93, at 114, and *Jaramillo v. United Kingdom* (Appln. 24865/94).

[15] *Bouchelkia v. France* (1997) 25 EHRR 686, at 707.

[16] See, for example, *Puli'uvea v. Removal Review Authority* (1996) 2 HRNZ 510 (Court of Appeal).

[17] The State party notes that this assessment took place before the recent internal dissension in Fiji, the facts of which could be advanced by the author in lodging a new application for a permit.

[18] See, *Puli'uvea* op. cit., *Tavita v. Minister of Immigration* [1994] 2 NZLR 257 (Court of Appeal), *Schier v. Removal Review Authority* [1999] 1 NZLR 703 (Court of Appeal).

[19] The State party refers to general comment 15 "The position of aliens under the Covenant".

[20] *De Groot v. The Netherlands* (Case No. 578/1994, Decision adopted on 14 July 1995), *Maroufidou v. Sweden* (Case No. 58/1979, Views adopted on 9 April 1981).

[21] See note 4, supra.

[22] Reports by Julie Patterson, Senior Family Therapist, Capital Coast Health.

[23] Letter, dated 19 December 2001, by Julie Patterson, Senior Family Therapist, Capital Coast Health.

[24] See, for example, *F (on behalf of C) v. Australia* (Case No. 832/1998, Decision adopted on 25 July 2001).

[25] See, by contrast, the approach taken in the special circumstances of *Laureano v. Peru* Case No. 540/1993, Views adopted on 25 March 1996, where the State party was found in violation of, inter alia, articles 6, 7 and 9 of the Covenant.

[26] *Winata v. Australia* Case No. 930/2000, Views adopted on 26 July 2001.

[27] Ibid.

R. Communication No. 900/1999, *C. v. Australia**
(Views adopted on 28 October 2002, seventy-sixth session)

Submitted by:	Mr. C. [name withheld] (represented by counsel, Mr. Nicholas Poynder)
Alleged victim:	The author
State party:	Australia
Date of communication:	23 November 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2002,

Having concluded its consideration of communication No. 900/1999, submitted to the Human Rights Committee on behalf of Mr. C. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, initially dated 23 November 1999, is Mr. C.,[1] an Iranian national, born 15 January 1960, currently imprisoned at Port Phillip Prison, Melbourne. He claims to be a victim of violations by Australia of articles 7 and 9,[2] in conjunction with article 2, paragraph 1, of the Covenant. He is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden. Under rule 85 of the Committee's rules of procedure, Mr. Ivan Shearer did not participate in the examination of the case.

The texts of individual opinions signed by Committee member Sir Nigel Rodley, by Committee member Mr. David Kretzmer, and by Committee members Mr. Nisuke Ando, Mr. Eckart Klein and Mr. Maxwell Yalden are appended to the present document.

1.2 Following submission of the communication to the Human Rights Committee on 23 November 1999, a request for interim measures, pursuant to Rule 86 of the Committee's rules of procedure, was transmitted on 2 December 1999 requesting the State party to stay the author's deportation whilst his case was before the Committee.

The facts as presented

2.1 The author, who has close family ties in Australia[3] but none in Iran, was lawfully in Australia from 2 February 1990 to 8 August 1990 and left thereafter. On 22 July 1992, the author returned to Australia with a Visitor's Visa but no return air ticket, and was detained, as a "non-citizen" without an entry permit, in immigration detention under (then) s.89 Migration Act 1958 pending removal ("the first detention").

(a) First application for refugee status and subsequent proceedings

2.2 On 23 July 1992, he made an application for refugee status, on the basis of a well-founded fear of religious persecution in Iran as an Assyrian Christian. On 8 September 1992, a delegate for the Minister of Immigration and Multicultural Affairs refused the application. On 26 May 1993, the Refugee Status Review Committee upheld the refusal, and the author appealed against this refusal to the Federal Court.[4]

(b) Application to the Minister for interim release and subsequent proceedings

2.3 Meanwhile, in June 1993, the author applied to the Minister for Immigration for interim release from detention pending the decision of the Federal Court on his refugee application. On 23 August 1993, the Minister's delegate rejected the application, observing that there was no power under s.89 Migration Act to release a person unless the person was removed from Australia or granted an entry permit. On 10 November 1993, the Federal Court rejected the author's application for judicial review of the Minister's decision, confirming that no residual/discretionary power existed in s.89 Migration Act, either expressly or by implication, enabling release of a person detained thereunder. On 15 June 1994, the Full Court of the Federal Court dismissed the author's further appeal. It rejected inter alia an argument that article 9, paragraph 1, of the Covenant favoured an interpretation of s.89 which authorized only a minimum period of detention, and implied, where necessary, a power of release from custody pending the determination of an application for refugee status.

(c) Release on mental health grounds and second application for refugee status

2.4 On 18 August 1993, the author was psychologically assessed.[5] The assessment followed "some concern for his emotional and physical health following a lengthy incarceration". The author, who had attempted to commit suicide by electrocution, repeated his intent to commit suicide and exhibited "extreme scores on all the depression scales". He had been prescribed tranquillizers in August 1992 and from March to June 1993. The psychologist, observing "coarse tremor", considered his paranoia "not unexpected". She saw "many indications of the toll that 12 months of imprisonment has had upon him", finding him "actively suicidal" and "a serious danger to himself". He could not accept the visits of his family, having developed "a sense of persecution at the center and believ[ing] that they speak loudly to hurt him". She considered "if he were free he would be able to regain a sense of sanity".

2.5 On 15 February 1994, the author's deteriorating psychiatric condition was again assessed.[6] The expert recommended "further psychiatric assessment and treatment on an urgent basis", which would unlikely be of benefit in continued detention. The author "need[ed] some respite from these conditions [of detention] urgently", and an assessment of appropriate external arrangements "should be explored as a matter of urgency" to avoid "a risk of self harm or behavioural disturbance if urgent steps are not taken". On 18 June 1994, at the request of detention center staff, the same expert reassessed the author.[7] He found significant deterioration, with an increased sense of being watched and persecuted and "clear-cut delusional beliefs". As previously, there was significant depression, with the expert considering that the author had deteriorated to "a frank delusional disorder with depressive symptoms in addition". He clearly required anti-psychotic medication and possibly anti-depressants subsequently. As his condition was "substantially due to the prolonged stress of remaining in detention", the expert recommended release and external treatment. He warned however that "there is no guarantee that his symptomatology will resolve rapidly even if he were released and he would require expert psychiatric care in the wake of release to monitor this recovery process".

2.6 On 10 August 1994, pursuant to s.11 Migration Act, the author was released from detention into his family's custody on the basis of special (mental) health needs. At this point, the author was behaving delusionally and was undergoing psychiatric treatment. On 29 August 1994, the author again applied for refugee status, which was granted on 8 February 1995 in view of the author's experiences in Iran as an Assyrian Christian, along with the deteriorating situation of that religious minority in Iran. Weight was also attached to "marked deterioration in his psychiatric status over the protracted period of his detention and diagnosis of delusional disorder, paranoid psychosis and depression requiring pharmaceutical and psychotherapeutic intervention", which would heighten adverse reaction by the Iranian authorities and the extremity of the author's reaction. On 16 March 1995, he was granted the corresponding protection visa in recognition of his refugee status.

(d) The criminal incidents and subsequent criminal proceedings

2.7 On 20 May 1995, the author, mentally deluded and armed with knives, broke into the home of a friend and relative by marriage, Ms. A, and hid in a cupboard. On 17 August 1995, he pleaded guilty to charges of being unlawfully on premises and intentionally damaging property, and received a non-custodial community-based order and psychiatric treatment. On 1 November 1995, the author returned to Ms. A's home, damaging property and threatening to kill her, and was arrested. On 18 January 1996, the author made further threats to kill Ms. A by telephone, and was again arrested and detained in custody. As a result of the latter two incidents, on 10 May 1996, the author was convicted in the Victoria County Court of aggravated burglary and threats to kill, and was sentenced cumulatively to a term of 3½ years' imprisonment (with 18 months before parole). The author did not appeal the sentence.

(e) Deportation order and subsequent substantive review proceedings

2.8 On 16 December 1996, the author was interviewed by a delegate of the Minister with a view to possible deportation as a non-citizen, being in Australia less than 10 years, who had committed a crime and been sentenced to at least a year in prison. On 21 October 1996, the author underwent a psychiatric assessment at the request of the Minister's delegate.[8] The assessment, noting that no previous illness was apparent and that his morbid-origin persecutory beliefs developed in detention, found "little doubt that there was a direct causal relationship between the offence for which he is currently incarcerated and the persecutory beliefs that he held on account of his [paranoid schizophrenic] illness". It found, as a result of treatment, a decreasing risk of future acts based on his illness, but an ongoing need for careful psychiatric supervision. On 24 January 1997, the author underwent a further psychiatric assessment coming to similar conclusions.[9] On 8 April 1997, the Minister ordered the author deported on this basis.

2.9 On 24 April 1997, the author appealed the deportation order to the Administrative Appeals Tribunal (AAT). On 28 July 1997[10] and 1 August 1997,[11] the author underwent further psychiatric assessments. On 26 September 1997, the AAT dismissed the author's appeal, while appearing to accept that the author's me[illegible]il health was caused by his protracted immigration detention.[12] On 11 November 1997, t[illegible]chiatrist treating the author during his criminal sentence interceded *proprio motu* before the Minister on the author's behalf.[13] On 29 July 1998, the author succeeded on appeal to the Federal Court of Australia, on the basis that his mental disturbance and personal circumstances had not sufficiently been taken into account in assessing whether the author's offence of threatening to kill was a "particularly serious crime", which, under article 33 of the Convention on the Status of Refugees 1951 ("the Convention"), could justify refoulement. The case was accordingly remitted to the AAT. In March 1998, treatment of the author with a particular drug (Clorazil) was commenced, which contributed to dramatic improvements in the author's condition.

2.10 On 26 October 1998, the AAT, differently constituted, again affirmed the deportation decision after rehearing. The AAT found that, while he could suffer a recurrence of his delusional behaviour in Iran which given his ethnicity and religion could lead to a loss of freedom, this would not be "on account of" his race or religion. Accordingly, he fell outside the provisions of the Convention. It also found that, while the author remained under control when he took appropriate medication,[14] he believed he was not ill and that there was a real chance he would cease his medication. While it found a "lack of certainty" that the author would be able to obtain Clorazil in Iran, it made no findings on the standard of Iranian health-care facilities. However, it considered that the author was at grave risk of not seeking out appropriate treatment generally, and in particular Clorazil, without which his psychotic delusions would return. It considered that there was no evidence of back-up treatment in Iran should the author fail to take his medication, and that the likelihood of a recurrence of illness was greater in Iran than Australia. It made no finding on the cause of the author's mental illness.

2.11 On 23 November 1998, the author again appealed the AAT's decision to the Federal Court. On 4 December 1998, the author was granted parole from his criminal conviction under strict conditions,[15] but remained in immigration detention pending the appeal against the AAT's decision. On 15 January 1999, the Federal Court, by expedited hearing, again allowed the author's appeal against the AAT's decision. It found that the AAT had improperly construed the protection of article 33 of the Convention,[16] and moreover that it had again failed to properly consider the mitigating circumstances constituted by the author's state of mind at the time of commission of the offences. The Court remitted the case to the AAT for urgent hearing, and accordingly denied the author's accompanying motion for interim release. On 5 February 1999, the Minister appealed the Federal Court's decision to the Full Court of the Federal Court ("the Full Court"). On 20 July 1999, the Full Court allowed the Minister's appeal against the judgement of 15 February 1999, holding that the AAT's findings in "an extremely difficult case", while "debatable", had been open to it on the evidence and had properly balanced the competing factors.[17] The Court noted that "while [his] illness can be controlled by medication available in Australia [Clorazil], the medication is probably not available in Iran". Accordingly, the effect of the decision was that the deportation order stood. On 5 August 1999, the author applied to the High Court for special leave to appeal against the Full Court decision. On 11 February 2000, the application for special leave was dismissed.

(f) The applications to the Minister and subsequent proceedings

2.12 On 19 January 1999, following the Federal Court's second decision in the author's favour against the AAT, and later in February and March, the author applied to the Minister for revocation of the deportation order and for release from immigration detention, supplying a substantial body of medical opinion in support.

2.13 On 11 and 18 March 1999, the Minister decided that he would not order the author's release and that he would remain in detention. On 29 March 1999, the author applied to the Federal Court for judicial review of the Minister's decision. On 8 April 1999, the author sought interim relief pending the decision of the Federal Court on the main 29 March application. On 20 April 1999, the Federal Court dismissed the application by the author for review of the Minister's decision not to release him. The Court considered that, while there was a serious question as to whether the Minister had taken into account an irrelevant consideration when making his decision, the balance of convenience favoured refusal of the order given the imminence of appeal to the Full Court on the AAT's decision. On 19 May 1999, the Minister supplied his reasons for declining the author's release. He assessed, relying in part upon the AAT decisions which had been vacated on appeal, the possibility of the author's re-offending as significantly high and concluded that the author constituted a continuing danger to the community and to his victim. On 15 October 1999, the Minister responded to requests of 6 and 22 September 1999, and 15 October 1999, for revocation of the deportation order and/or interim release pending final determination of his case. He refused the request for interim release, and stated that he was continuing to assess the request for revocation of the deportation order. In December 2000, the Minister declined, following further requests for intervention, to release the author.[18]

The complaint

3.1 The author contends that he has suffered a violation of his rights under article 7 in dual fashion. Firstly, he was detained in such a way and for such a prolonged period (from his arrival on 22 July 1992 until 10 August 1994) as to cause him mental illness, from which he did not earlier suffer. The medical evidence was unanimous in concluding that his severe psychiatric illness was brought about by his prolonged incarceration,[19] and this had been accepted by the AAT and the courts. The author contends that he was initially imprisoned without any evidence of a risk of abscondment or other danger to the community. He could have been released into the community with commonly utilized bail conditions such as a bond or surety, or residential and/or reporting requirements. The author also alleges that his current detention is in breach of article 7.[20]

3.2 Secondly, the author argues a violation of article 7 by Australia in that his proposed deportation to Iran would expose him to a real risk of a violation of his Covenant rights, at least of article 7 and possibly also article 9, by Iran. He refers in this connection to the Committee's jurisprudence that if a State party removes a person within its jurisdiction, and the necessary and foreseeable consequence is a violation of that person's rights under the Covenant in another jurisdiction, the State party itself may be in violation of the Covenant.[21] He considers that the

Minister's delegate found that the author had a well-founded fear of persecution in Iran because of his religion and because his psychological state may bring him to the notice of the authorities which could lead to the deprivation of his liberty under such conditions as to constitute persecution. Far from being overturned in subsequent proceedings, the AAT in fact affirmed this position. Moreover, the author argues that the pattern of conduct shown by Iran supports the conclusion that he will be exposed to a violation of his Covenant rights in the event of deportation.[22]

3.3 The author further claims that his prolonged detention in Australia upon arrival breaches article 9, paragraphs 1 and 4, of the Covenant, as he was detained upon arrival under the mandatory (non-discretionary) provisions of (then) s.89 Migration Act. Those provisions do not provide for any review of detention, either by judicial or administrative means. The author considers his case to fall within the principles laid down by the Committee in its Views in *A.v.Australia*,[23] in which the Committee held that detention, even of an illegal immigrant, which was neither reviewed periodically nor otherwise justified in the particular case violated article 9, paragraph 1, and that the absence of real judicial review including the possibility of release violated article 9, paragraph 4. The author emphasizes that, as in *A*'s case, there was no justification for his prolonged detention, and that the present legislation had the same effect of depriving him of the ability to make an effective judicial application for review of detention. For these violations of article 9, the author seeks adequate compensation for his detention under article 2, paragraph 3. The author also maintains that his current detention is in violation of article 9.[24]

The State party's submissions on admissibility and merits

4.1 By submissions of 1 March 2001, the State responded on both the admissibility and the merits of the author's claims.

4.2 As to the admissibility of the claims made under article 7, the State party argues that most of the claims are inadmissible. In respect of the first claim that the prolonged detention violated article 7, the State party considers that the claim is unsubstantiated, that it is beyond the scope of article 7, and that domestic remedies have not been exhausted. The author has not advanced any evidence of acts or practices by the State party rising beyond the mere condition of detention that would have rendered his detention particularly harsh or reprehensible. The only evidence submitted is that the author developed paranoid schizophrenia while in detention, whereas no evidence is submitted that his mental illness was caused by being subjected to any maltreatment of the type prohibited by article 7. Secondly, as the complaint is, in truth, an attack on the author's detention per se rather than on a reprehensible treatment or aspect of detention, it falls outside the scope of article 7 as previously determined by the Committee. Thirdly, the State party considers that the author has not exhausted domestic remedies. He could either file a complaint with the Human Rights and Equal Opportunity Commission (HREOC), which tables reports in Parliament, or to the Commonwealth Ombudsman, who could recommend remedies, including compensation.

4.3 In respect of that part of the second portion of the claim under article 7 that invokes the State party's responsibility for a subsequent violation in Iran of the author's rights under article 9, the State party argues that this falls outside the scope of article 7. The State party contends that the prohibition on refoulement under article 7 is limited to risks of torture or cruel, inhuman or degrading treatment or punishment. This prohibition does not extend to violations of article 9 as detention per se is not a violation of article 7.[25] Further the Committee has never stated that article 9 has a comparable non-refoulement obligation attached to it. The State party interprets *ARJ v. Australia*[26] for the proposition that due process guarantees are not within the ambit of the prohibition on non-refoulement, and argues that by analogy, neither would potential violations of article 9.

4.4 As to the admissibility of the claims made under article 9, the State party does not contest the admissibility of the claim made under article 9, paragraph 1, but considers the claim under article 9, paragraph 4, inadmissible for failure to exhaust domestic remedies and want of substantiation. The State party contends that the author's initial period of detention was considered and declared lawful by both a single judge, and on appeal, a Full Court, of the Federal Court. At no stage during his initial or subsequent detention did the author seek habeas corpus or invoke the High Court's original jurisdiction to seek a writ of mandamus or other remedy. The State party recalls that mere doubts about the effectiveness of remedies does not relieve the claimant from the requirement to pursue them.[27] The State party also argues that the author's claim is simply an allegation that there was no way that he could apply to be released from detention, either administratively or by a court. He has not advanced any evidence of how article 9, paragraph 4, had been violated, and, as stated above, he did in fact challenge the lawfulness of his detention on several occasions. The claim is accordingly unsubstantiated.

4.5 As to the merits of the claims, the State party considers all of them to be unfounded.

4.6 As to the first portion of the claim under article 7 (related to the author's detention), the State party notes that, while the Committee has not drawn sharp distinctions between the elements of article 7, it has nevertheless drawn broad categories. It observes that torture relates to deliberate treatment intended to cause suffering of a particularly high intensity and cruelty for a certain purpose.[28] Cruel or inhuman treatment or punishment refers to acts (primarily in detention) which must attain a minimum level of severity, but which do not constitute torture.[29] "Degrading" treatment or punishment is the "weakest" level of violation of article 7, in which the severity of suffering is less important than the level of humiliation or debasement to the victim.[30]

4.7 Accordingly, it is clear that while particularly harsh conditions of detention may constitute a violation of article 7 (whether the suffering is physical or psychological), detention, in and of itself, is not a violation of article 7. In *Vuolanne v. Finland*, the Committee expressed the view that "for punishment to be degrading, the humiliation or debasement must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty".[31] Similarly, the Committee has consistently expressed the view that, even prolonged periods of detention on "death row" do not violate article 7.[32] For detention to violate article 7 there must be some element of reprehensibleness in the treatment of detainees.

4.8 Assessing the general conditions of immigration detention in the light of these standards, the State party emphasizes that to ensure the well-being of all persons in immigration detention, it has instituted Immigration Detention Standards that govern the living conditions of detainees within its detention facilities and specify the distinctive nature of services that are required in an immigration detention environment. These standards address protection of the privacy of detainees; health care and safety; spiritual, social, educational and recreational activities;

interpreters; and training of detention centre staff in cultural diversity and the like. The State party submits that conditions at the MIDC are humane and such as to ensure the comfort of residents while they are awaiting the outcome of their visa applications.

4.9 Turning to the author's particular situation, at no time during his detention did he make a complaint to DIMA, the Commonwealth Ombudsman, the Human Rights and Equal Opportunity Commission or the United Nations High Commissioner for Refugees, the possibilities of which were well advertised. The author was at all times treated humanely at the MIDC, and his physical and mental integrity and well-being were afforded particularly high priority, over and above the level of ordinary care, by MIDC staff. For example, following his complaints about noise levels, MIDC staff reduced the volume level on the announcement system and reduced the number of times the system was used during the day. Further, when he complained of being unable to sleep because of noise in the dormitory area, alternative sleeping arrangements were offered to him. Similarly, prior to his actual release into family care, MIDC staff arranged for him to be taken out to his family on a fortnightly basis so that he could have a meal with them and get a break from the routine of the IDC. Eventually, on 10 August 1994, the author was released on an ongoing basis into the care of his family when it became apparent that his psychological state warranted this measure. Further, at all times he was provided with adequate and professional medical attention.

4.10 Turning to the development of the author's paranoid schizophrenia, the State party contends that there is a convincing body of literature indicating that a predisposition for schizophrenia is genetically determined.[33] Thus, while it is deeply unfortunate that he author's schizophrenic symptoms developed while in detention, he is likely to have been predisposed to develop the condition, and the development of this condition does not necessarily reflect the conditions under which he was detained. While acknowledging that any deprivation of liberty may cause some psychological stress, such emotional stress does not amount to cruel, inhuman or degrading treatment (and certainly does not constitute a punishment). In any case, medical evidence indicates that the development of schizophrenia is not linked to the experience of a "gross stressor".

4.11 As to the second portion of claims under article 7 (concerning future violations of his rights in Iran in the case of a deportation), the State party accepts that it is under a limited obligation not to expose the author to violations of his rights under the Covenant by returning him to Iran.[34] It submits, however, that this obligation does not extend to all rights in the Covenant, but is limited to only the most fundamental rights relating to the physical and mental integrity of the person.[35] From the Committee's jurisprudence, the State party understands that this obligation has only been considered in relation to the threat of execution (art. 6)[36] and torture (art. 7) upon return, and accordingly it submits that this obligation is limited to these two rights under article 6 and article 7. In relation to article 7, the prohibition must plainly relate to the substance of that article, and can therefore only encompass the risk of torture and, possibly, cruel, inhuman or degrading treatment or punishment. The State party considers that the Committee has itself stated that the prohibition under article 7 does not extend, for example, to due process guarantees under article 14.[37] It adds that it is well established that the risk of a violation of article 7 must be real in the sense that the risk of a violation must be the necessary and foreseeable consequence of a person's return.[38]

4.12 Turning to the case at hand, the State party rejects the author's contention that it is a necessary and foreseeable consequence of his return to Iran that he will be subjected to torture or cruel, inhuman or degrading treatment or punishment for three reasons.

4.13 Firstly, the recognition of the author's refugee status was based on many considerations other than the risk of an article 7 violation. The State party contends that the granting of refugee status was made on the basis that he might suffer "persecution" in the event of return. The State party submits that "persecution" may be understood as persistent harassment by, or with the knowledge of, authorities.[39] The core meaning of "persecution" readily includes the deprivation of life or physical freedom, but also encompasses such harassment as denial of access to employment, to the professions or education, and restriction of the freedoms traditionally guaranteed in a democratic society, such as speech, assembly, worship or freedom of movement.[40] Factors such as discrimination experienced in employment, education and housing, difficulties in practising his religion and the deteriorating human rights situation in Iran at the time were considered in granting the author's application. Persecution is, thus, a much broader concept than that encompassed by article 7 of the ICCPR, and refugee recognition should not lead the Committee to the conclusion that it is a necessary and foreseeable consequence of the author's return to Iran that he would be subjected to article 7 violations.

4.14 Secondly, the State party contends that the reports of Dr. C. Rubinstein on the human rights situation in Iran,[41] upon which the author relies, misrepresent the realities. The State party argues that the human rights situation in Iran has much improved in recent years following the election of a reformist president and government, and refers to the United Nations High Commissioner for Human Rights statement in April 2000 welcoming the report by the Special Representative of the Commission on the improving human rights situation in Iran.[42] There are indications that relations between the Iranian Government and the Assyrian Christians are improving substantially.[43]

4.15 The State party argues that it seems that official interference with Christian religious activities is limited to those Christian faiths that proselytize and Muslim individuals who abandon Islam to become Christians, asserting that Assyrian Christians do not actively engage in conversions and, in fact, tend to discourage Muslims from joining their faith. According to information from the State party's Mission in Iran, this means that they are subject to far less scrutiny and harassment than members of other Christian and minority faiths may be. To the State party's Government's knowledge, the arrests, attacks and killings of Christians referred to in Dr. Rubenstein's reports represent isolated incidents and are related not to Assyrians, but to evangelistic Christians and apostates.

4.16 The State party's Mission in Iran further advised that Assyrian Christians, if they abide by the laws of the land, are able to lead normal and undisturbed lives. They have not been singled out for discrimination by the Iranian Government for some time. Further, it is clear from the State party's information that Assyrian Christians have never been subjected to the same level of harassment as other minority religions. Assyrian Christians have largely been allowed to carry out their religious activities without interference. There are also strong indications that Assyrian Christians have recently been able to strengthen their political situation. President Khatami has met specifically with the Assyrian Christian Representative of the Majlis (Parliament), Mr. Shamshoon Maqsudpour, who has also been able to bring about changes to Iranian law so as to eliminate any statutory discrimination in the employment of Christians.

4.17 The State party also understands that in 1999 the Islamic Human Rights Commission, which is affiliated with Iran's judiciary, commenced work on upgrading the rights of religious minorities in Iran. This effort should be seen in conjunction with the commitment made recently by the Iranian Government to promote respect for the rule of laws, including the elimination of arbitrary arrest and detention, and to bring the legal and penitentiary system into line with international standards.[44]

4.18 The State party concedes however that the author and his family were subjected to some harassment by the "pasdahs" (vigilante youths) in Iran. On one occasion, he was detained by pasdahs, questioned in relation to the contents of certain cassette tapes found in his car, and released within 48 hours after having suffered some blows to his face. On a second occasion, his family was detained by pasdahs for approximately 24 hours for having served alcohol at a party. They were released without any physical harm. The State party argues that these events occurred some years ago, and there is no indication that the pasdahs specifically targeted the author or his family. These two incidents do not represent a personal persecution of the author, who is not a high profile Assyrian Christian.

4.19 The Australian Government submits that the real situation of an Assyrian Christian in Iran is far more benign than that described by Dr. Rubenstein. In most cases, Assyrian Christians are able to practise their religion and to live normal lives without harassment by Iranian authorities. Although they may be subject to some continuing discrimination in the field of housing, education and employment, there are strong signs of growing effort on the Iranian Government's behalf to settle differences with Assyrian Christians specifically, and to improve the human rights situation in Iran generally.

4.20 Thirdly, in relation to the potential effects of the author's psychiatric condition, the State party understands from its Mission in Iran that Iranian medical authorities have a good understanding of mental illnesses, that appropriate and comprehensive care is available in Iran both at home and in hospital for persons suffering from mental illnesses (including paranoid schizophrenia). Nor is there any requirement in the hospital admission process for a person to advise of their religion, or any evidence that Assyrian Christians have less than full access to psychiatric facilities. To the State party's knowledge, there is no precedent of persons being arbitrarily detained or subjected to article 7 violations simply on account of their mental illnesses.

4.21 The State party submits that it has taken all possible steps to educate the author about the nature of his condition, so as to promote his ongoing adherence to treatment, and would provide him with all necessary medical documentation for him to receive continued medical attention once he returns to Iran. The assertion that he would not pursue medical treatment upon return to Iran is conjecture, and the author has at all times cooperated with his treatment in Australia. As such, it cannot be stated with any certainty that it is a necessary consequence of his return to Iran that he will cease treatment. Even if he did choose to discontinue his medication, it is not a necessary consequence that he would act in such a way to risk torture or cruel, inhuman or degrading treatment or punishment. The nature of paranoid schizophrenia is such that any violent or bizarre behaviour is linked directly to the sufferer's delusions. Therefore, paranoid schizophrenics do not display globally and consistently aggressive or extraordinary behaviours. Any such behaviour is limited to the object of their delusional thoughts. In the author's case, such behaviour has been limited to very specific persons, and his records do not indicate a history of generalized aggressive or hysterical behaviour towards officials or in official settings. Therefore, the State party does not consider that it is a necessary consequence of the author returning to Iran that he will have an adverse reaction to Iranian authorities.

4.22 As to the author's claims under article 9, the State party also considers them unfounded. It clarifies at the outset that the "initial detention" ran, as a matter of law, from his detention on arrival until the issuance of the protection visa in March 1995, even though as a practical matter he was exceptionally released into his family's care in August 1994, for a person remains by law detained until removed or granted permission to remain in Australia. As to the "current detention" pending execution of a deportation order, detention is not mandatory and an individual can be released at the Minister's discretion.

4.23 Concerning the complaint under article 9, paragraph 1, the State party argues that the prohibition against the deprivation of liberty is not absolute.[45] While a detention must be lawful in terms of the domestic legal order, it contends that in determining the further element of arbitrariness in a particular case key elements are whether the circumstances under which a person is detained are "reasonable" and "necessary" in all of the circumstances or otherwise arbitrary in that the detention is inappropriate, unjust or unpredictable. It emphasizes that the Committee's jurisprudence of the Committee does not suggest that detention of unauthorized arrivals or detention for a particular length of time could be considered arbitrary per se,[46] rather the determining factor is not the length of the detention but whether the grounds for the detention are reasonable, necessary, proportionate, appropriate and justifiable in the particular case.

4.24 Turning to the particular case, the State party argues that the author's detention was and is lawful, and reasonable and necessary in all of the circumstances. It is, according to the State party, also clearly distinguishable on the facts from the case of *A. v. Australia*.

4.25 As to the initial detention, he was detained by law, under the s.89 Migration Act 1958. This detention was twice judicially confirmed. As to arbitrariness, both the provisions of the Migration Act under which the author was detained, as well as the individual circumstances of his case, justified his necessary and reasonable detention.

4.26 The State party underscores that mandatory immigration detention is an exceptional measure primarily reserved for people who arrive in Australia without authorization.[47] It is necessary to ensure that persons entering Australia are entitled to do so, and to ensure that the integrity of the migration system is upheld. The detention of unauthorized arrivals ensures that they do not enter Australia before their claims have been properly assessed and found to justify entry. It also provides officials with effective access to those persons in order to investigate and process their claims without delay, and if those claims are unwarranted, to remove such persons as soon as possible. The State party argues that the detention of unauthorized arrivals is consistent with fundamental rights of sovereignty, including the right of States to control the entry of persons into its territory. As the State party has no system of identity cards or the like for access to social services, it is more difficult to detect, monitor and apprehend illegal immigrants in the community, compared with countries where such a system is in place.[48]

4.27 The State party's experience has been that unless detention is strictly controlled, there is a strong likelihood that people will escape and abscond into the community. In some cases, some unauthorized arrivals who had been held in unfenced migrant hostels with a reporting requirement had absconded. It had also been difficult to gain the cooperation of the local ethnic communities to locate such persons.[49] As such, it was reasonably suspected that if people were not detained, but rather released in the interim into the community, there would be a strong incentive for them not to adhere to the conditions of release and to disappear into the community. The State party repeats that all applications to enter or remain are thoroughly considered, on a case-by-case basis, and that therefore its policy of detaining unauthorized arrivals is reasonable,[50] proportionate and necessary in all of the circumstances. As such, the provisions under which the author was detained, while requiring mandatory detention, were not arbitrary, as they were justifiable and proportionate on the grounds outlined above.

4.28 In addition, the individual factors of the author's detention also indicate the absence of arbitrariness. He arrived with a visitor's visa but no return airline ticket, and when questioned at the airport a number of false statements on his visa application form were detected. These included the assertion that his mother and father were living in Iran, when in fact his father was dead and his mother was living in Australia and had applied for refugee status. He also stated that he had $5,000 in funds for his visit, but arrived with no funds and lied in the interview about this matter. He had also purchased a return ticket for the purposes of gaining his visa, but had cashed it in when the visa was granted. As such, it was reasonably suspected that if allowed to enter Australia, he would become an illegal entrant. The detention was accordingly necessary to prevent abscondment, it was not disproportionate to the end sought, and it was not unpredictable, given that the relevant detention provisions had been in force for some time and were published.

4.29 The State party also considers that there were further reasons for the continued detention, pending the assessment of the refugee claim. It was not expected that the processing of the claim would be unduly prolonged so as to warrant his release from detention. The processing and review applications were dealt with expeditiously by both the primary decision maker and the review body, with the author held in detention for just over two years. The original application was processed in less than two months, and the first review of the decision took approximately six weeks. The total time taken from the filing of the first application on 23 July 1992 to the completion of the initial processing and several administrative reviews of the first application for refugee status was less than one year.

4.30 The State party argues that, once it became clear that continued detention was not conducive to the treatment of the author's mental illness, he was released into the care of his family. As such, while detention was mandatory, it was not arbitrary, with the policy underlying the detention provisions flexible enough to provide for release in exceptional circumstances. Therefore, it cannot be said that there were no grounds upon which a person could apply to be released from detention, either administratively, or by a court.

4.31 The State party, while disagreeing with the Committee's Views in *A. v. Australia*, notes significant factual differences with that case. Firstly, the length of detention was significantly less (some 26 months rather than 4 years). Secondly, the time taken to process the initial application was significantly less (under 6 weeks rather than 77 weeks). Thirdly, in this case, there is no suggestion that the period and conditions of detention prevented the author from gaining access to legal representation or visits from his family. Finally, he was actually released from the usual places of detention into the care and custody of family members pursuant to an exercise of Executive discretion.

4.32 As to the current detention, the author has been lawfully held in immigration detention, pursuant to ss.253 and 254 Migration Act 1958, since he was granted parole from his prison sentence on 4 December 1998. Rather than being arbitrary, it is necessary and reasonable in all of the circumstances, and proportionate to the end sought of ensuring he does not abscond pending his deportation and of protecting the Australian community. After appeals were exhausted, the State party stayed the deportation in response to the Committee's rule 86 request pending finalization of this matter. Moreover, the State party submits that it is reasonable to suspect that the author would breach his release conditions and abscond if released.

4.33 The State party notes that its Minister for Immigration personally considered the justification for continued detention on several occasions, and his 11 March 1999 decision not to release the author from detention was reviewed by the Federal Court and found justified. The Minister's reasons for decision clearly indicate that it was not arbitrary. All of the factors relevant to the case were considered in reaching the decision not to grant release, on the basis that there was a significantly high possibility that the author would re-offend and that he constituted a continuing danger to the community and in particular to his victim, Ms. A.

4.34 As to the claim under article 9, paragraph 4, the State party notes that this requires a person to be able to test the lawfulness of detention. The State party rejects the suggestion by the Committee in *A. v. Australia* that "lawfulness" in this provision was not limited to compliance with domestic law and must be consistent with article 9, paragraph 1, and other provisions of the Covenant. It contends there is nothing in the terms or structure of the Covenant, or in the *travaux préparatoires* or the Committee's general comments, that supports such an approach.

4.35 The State party identifies the various mechanisms in its law to test the legality of detention,[51] and states that it was open to the author at all times to pursue these mechanisms. It repeats that, in relation to the first detention, the author never directly applied to the courts for review of his detention, but applied to the Minister for interim release pending the outcome of his appeal against the denial of refugee status. The Minister's rejection of the application was twice upheld in court. As to the current detention, while he has sought interim release, at no time has he directly challenged the lawfulness of his detention. As to the current detention, the State party notes that the author has on several occasions unsuccessfully sought release from the Minister and the Federal Court. The fact that the courts did not rule in his favour is not proof of a violation of article 9, paragraph 4. In any event, he did not seek to exercise avenues available to him to directly challenge the detention. The State party refers to *Stephens v. Jamaica*[52] for the proposition that a failure to take advantage of an available remedy of, for example, habeas corpus is not evidence of a breach of article 9, paragraph 4.

Comments by the author on the State party's submissions

5.1 By submission of 16 May 2001, the author responded to the State party's submissions.

5.2 As to the State party's submissions on available domestic remedies, the author points to the Committee's jurisprudence that such remedies may be taken to refer to judicial remedies, especially in cases of serious violations of human rights,[53] such as arbitrary and prolonged detention. In any case, there is no obligation to pursue remedies that are neither enforceable nor effective,[54] and neither a complaint to HREOC or the Ombudsman produces a binding order upon the State.[55] As to the ability to pursue a habeas corpus claim in the High Court, such an act would be futile given that the High Court has upheld the validity of mandatory detention laws.[56]

5.3 In response to the State party's claim that there is no evidence that a breach of article 7 caused the author's mental illness, the author refers to the series of expert assessments of the author over an extended period, provided with the communication, along with a new assessment, unanimously drawing a specific causal link between detention and the psychiatric illness.[57] The author criticizes the State party's reliance on generalized psychiatric literature for the opposite proposition that the author's mental harm arose from predisposition rather than prolonged detention, and invites the Committee to prefer the specific assessments of the author. The author submits that the submissions by the State party on living standards at MIDC are not relevant, for the claim of breach of article 7 is the detention of the author for a prolonged period where it well knew that this was causing severe psychological trauma. From at least 19 August 1993, the State party's authorities knew of this trauma, and the act of continuing to hold him in light of that knowledge, provides the "element of reprehensibleness" under article 7.

5.4 As to the claim of a violation of article 7 in the event of a return to Iran, the author notes that it was clear that the form of persecution the Minister's delegate had in mind on 8 February 1995 when approving the refugee claim involved article 7 rights.[58] She considered that there was a real chance that he would suffer deprivation of liberty "under such conditions as to constitute persecution under the [Refugee] Convention", which, according to the author, clearly goes beyond detention per se. The author also rejects the State party's supposition that the situation in Iran has improved to the extent that there is no foreseeable risk of a violation of his rights. The Special Representative's report referred to by the State party is far from conclusive on the "improving" human rights situation, noting that "human rights in Iran remains very much a work in progress" and "greater efforts are required". Moreover, the subsequent report of the Special Representative, found that minorities remain "neglected" and that "there is a long way to go in terms of achieving a more forthcoming approach to the concerns of the minorities, both ethnic and religious".[59] The author also asserts that the psychological evidence contradicts the State party's claim that he would not discontinue his medication in the event of a return, or, should he do so, react adversely to the Iranian authorities. The author notes that it is not known whether his medication is available in Iran.

5.5 As to the complaint under article 9, the author contends that *A. v. Australia* conclusively established that the policy of mandatory detention violates article 9, paragraphs 1 and 4, and should be followed, for the present case is not factually distinguishable. The author clearly arrived to seek asylum, and did so within 24 hours of arrival. It is fanciful to suggest his detention in the initial period for two years was justified by false statements made about his parents' location and funds he possessed. There was no administrative review of his detention during this period, and efforts at judicial review failed because there is no power to release him from detention. His release from custody on 10 August 1994 due to his deteriorating psychological condition came after two years of non-reviewable detention, as demonstrated by the futility of earlier applications to the Federal Court for review of the decision to detain. As to the continuing detention, there is no justification, for three separate psychiatric reports of March 2000 (provided to the Minister) indicated his risk would pose "no detectable risk", he "has to be regarded as not demonstrating a significant risk to anybody any more", and he poses "no risk to either his former victim or the Australian community".[60] The author also provides a further psychiatric report dated 7 May 2001 that found that he had made a complete recovery for several years, and constituted no threat to the community, either specifically or generally.[61]

Supplementary comments by the State party and the author

6.1 By submission of 16 August 2001, the State party reiterates certain earlier submissions and makes further arguments. As to admissibility, the State party rejects the author's interpretation of *RT v. France*[62] that only judicial remedies need be exhausted, for the decision refers to judicial remedies "in the first place". Other administrative remedies are not excluded,[63] and therefore a complaint to HREOC, for example, is not excluded from the requirement of exhaustion of remedies. Similarly, *Vincente v. Colombia*,[64] according to the State party, only excludes administrative remedies that were not effective from the exhaustion requirement. Similarly, the State party contends that the Committee dispensed with the remedy argued in *Ellis v. Jamaica*[65] (a petition for mercy in a capital case) as being an ineffective remedy, rather than an "unenforceable" one as the author claims. In this case, by contrast, the State party argues its administrative remedies are effective, were not pursued by the author, and thus the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met.

6.2 The State party remarks, in response to the author's assertion that an "extra element of reprehensibleness" under article 7 was provided in the failure to release him despite knowledge of psychological damage caused by continuing detention, that he was in fact released by the Minister who considered that his mental health needs would benefit from family care.

6.3 The State party further understood the original complaint in terms of article 7 to relate only to the initial detention, but reads the author's subsequent comments (and reference to the 7 May 2001 psychiatric report assessing the author's current condition) as appearing to imply a fresh allegation in respect of the *current* detention as well. The State party responds that there is nothing to suggest that the current detention is particularly harsh or reprehensible so as to constitute a violation of article 7. It observes that the 7 May 2001 report found the author in good mental health, and did not provide any evidence of acts or practices suggesting that the current detention, per se or through its conditions, raised issues under article 7. Any suggestion that the current detention is causing the author psychological harm and therefore violating article 7 is unsustainable and should be dismissed as unfounded or inadmissible *ratione materiae*.

6.4 Finally, as to the article 9 claim in relation to the original detention, the State party rejects as incorrect the author's characterization that *A. v. Australia* "conclusively established that Australia's policy of mandatory detention was in breach of articles 9 (1) and 9 (4)". Rather than commenting on the policy *in abstracto*, it found that "arbitrariness" was to be determined by the existence of appropriate justification for continued detention in the individual circumstances of the case. Indeed, it stated that it was *not* per se arbitrary to detain persons seeking asylum.

6.5 By submission of 21 September 2001, the author responded to the State party's additional submissions, also clarifying that the claims under articles 7 and 9 relate to the current as well as the initial detention. As to admissibility, the author maintains that the administrative remedies raised by the State party are not "effective and enforceable" remedies. As any government decision to take action in response to a recommendation of either body is purely executive and discretionary in nature, exhaustion thereof should not be required.[66]

6.6 As to the merits, the author rejects the State party's argument that, as the 7 May 2001 report shows the author in good health, it cannot be said that the prolonged detention has caused him psychological damage. The author observes that the report was directed at determining whether his prior illness caused him to commit the crimes for which he is to be deported, and whether he currently poses any threat to anyone. The first issue was answered affirmatively, the second negatively. In any event, given that the State party accepts the author's current good health, there is no reason why he should be detained further or deported.

6.7 The author goes on to argue that the fact that he does not know whether or when he will be released, or whether or when he will be deported, on its own amounts to a violation of article 7. It is particularly cruel treatment or punishment as he has completed the prison sentence for his crimes, and because he previously suffered a psychiatric illness in immigration detention in circumstances that he did not know if or when he would be released or deported.

6.8 The author concludes, with reference to international jurisprudence, that mandatory detention of non-nationals for removal, without individual justification, is almost unanimously regarded as a breach of the right to be free from arbitrary and unlawful detention.[67]

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

7.3 As to the question of exhaustion of domestic remedies, the Committee notes the State party's argument that the certain administrative remedies (the Commonwealth Ombudsman and HREOC) have not been pursued by the author. The Committee observes that any decision of these bodies, even if they had decided the author's claims in his favour, would only have had recommendatory rather than binding effect, by which the Executive would, at its discretion, have been free to disregard. As such, these remedies cannot be described as ones which would, in terms of the Optional Protocol, be effective.

7.4 As to the claims relating to the first period of detention, the Committee notes that the legislation pursuant to which the author was detained provides for mandatory detention until either a permit is granted or a person is removed. As confirmed by the courts, there remained no discretion for release in the particular case. The Committee observes that the sole review capacity for the courts is to make the formal determination that the individual is in fact an "unlawful non-citizen" to which the section applies, which is uncontested in this case, rather than to make a substantive assessment of whether there are substantive grounds justifying detention in the circumstances of the case. Thus, by direct operation of statute, substantive judicial review which could provide a remedy is extinguished. This conclusion is not altered by the exceptional provision in s.11 of the Act providing for alternative restraint and custody (in the author's case his family's), while remaining formally in detention. Moreover, the Committee notes that the High Court has confirmed the constitutionality of mandatory regimes on the basis of the policy factors advanced by the State party.[68] It follows that the State party has failed to demonstrate that there were available domestic remedies that the author could have exhausted with respect to his claims concerning the initial period of detention, and these claims are admissible.

7.5 As to the claims relating to the author's proposed deportation to Iran, the Committee notes that with the denial of leave to appeal by the High Court he has exhausted all available domestic remedies in respect of these claims, which are accordingly admissible.

7.6 As to the State party's further arguments that the claims related to the first period of detention and the author's proposed deportation are unsubstantiated, the Committee is of the view, on the material before it, that the author has sufficiently substantiated, for the purposes of admissibility, that these facts give rise to arguable issues under the Covenant.

7.7 As to the claims related to the second period of detention (detention pending deportation), the Committee notes that, unlike mandatory detention at the border, it lies within the discretion of the Minister whether to direct a person be detained pending deportation. The Committee observes that such a decision, as well as any subsequent refusal by the Minister of a request for release, may be challenged in court by judicial review. Such judicial review proceedings may overturn a decision to detain (or to continue to detain) if manifestly unreasonable, or if relevant factors had not been considered, or if irrelevant factors had been considered, or if the decision was otherwise unlawful. The Committee notes that the Federal Court held, in its decision of 20 April 1999 on the author's urgent application for interim relief pending hearing of his application of 29 March 1999 against the Minister's decision not to release him, that there was a serious question to be tried as to whether the Minister had considered an irrelevant factor, but that in view of the imminent appeal to the Full Court in the deportation proceedings the balance of convenience was against release.

7.8 The Committee notes that the author has supplied no information whether he had (and if not, why he had not) pursued his review application of 29 March 1999 against the Minister's decision, or accepted the Court's invitation to reapply for relief after disposition of the Full Court appeal. Neither has the author explained his apparent failure to pursue review proceedings against the Minister's decisions later on 15 October 1999 and in December 2000 not to release the author. In the circumstances, the author has failed to exhaust domestic remedies in respect of any issues arising in the second period of detention, and his claims under articles 7 and 9 relating to this period are inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

8.2 As to the claims relating to the first period of detention, in terms of article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.[69] In the present case, the author's detention as a non-citizen without an entry permit continued, in mandatory terms, until he was removed or granted a permit. While the State party advances particular reasons to justify the individual detention (para. 4.28 et seq.), the Committee observes that the State party has failed to demonstrate that those reasons justify the author's continued detention in the light of the passage of time and intervening circumstances. In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1.

8.3 As to the author's further claim of a violation of article 9, paragraph 4, related to this period of detention, the Committee refers to its discussion of admissibility above and observes that the court review available to the author was confined purely to a formal assessment of the question whether the person in question was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a court, as indeed held by the Full Court itself in its judgement of 15 June 1994, to review the author's detention in substantive terms for its continued justification. The Committee considers that an inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

8.4 As to the author's allegations that his first period of detention amounted to a breach of article 7, the Committee notes that the psychiatric evidence emerging from examinations of the author over an extended period, which was accepted by the State party's courts and tribunals, was essentially unanimous that the author's psychiatric illness developed as a result of the protracted period of immigration detention. The Committee notes that the State party was aware, at least from August 1992 when he was prescribed tranquillisers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the author's continued detention and his sanity. Despite increasingly serious assessments of the author's conditions in February and June 1994 (and a suicide attempt), it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he remained in detention). As subsequent events showed, by that point the author's illness had reached such a level of severity that irreversible consequences were to follow. In the Committee's view, the continued detention of the author when the State party was aware of the author's mental condition and failed to take the steps necessary to ameliorate the author's mental deterioration constituted a violation of his rights under article 7 of the Covenant.

8.5 As to the author's arguments that his deportation would amount to a violation of article 7, the Committee attaches weight to the fact that the author was originally granted refugee status on the basis of a well-founded fear of persecution as an Assyrian Christian, coupled with the likely consequences of a return of his illness. In the Committee's view, the State party has not established that the current circumstances in the receiving State are such that the grant of refugee status no longer holds validity. The Committee further observes that the AAT, whose decision was upheld on appeal, accepted that it was unlikely that the only effective medication (Clozaril) and back-up treatment would be available in Iran, and found the author "blameless for his mental illness" which "was first triggered while in Australia". In circumstances where the State party has recognized a protection obligation towards the author, the Committee considers that deportation of the author to a country where it is unlikely that he would receive the treatment necessary for the illness caused, in whole or in part, because of the State party's violation of the author's rights would amount to a violation of article 7 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7 and 9, paragraphs 1 and 4, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. As to the violations of articles 7 and 9 suffered by the author during the first period of detention, the State party should pay the author appropriate compensation. As to the proposed deportation of the author, the State party should refrain from deporting the author to Iran. The State party is under an obligation to avoid similar violations in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Name withheld.

[2] While the author cited article 10 on the cover page of his communication, the subsequent substantive argument was directed to article 9 (see paragraph 3.3 infra), and the Committee accordingly takes the communication to proceed on the latter basis.

[3] The author's mother, along with his brother and sister-in-law reside in Australia, while his father is deceased. Another brother resides in Canada.

[4] It is unclear from the record whether the author's appeal to the Federal Court on the issue of the rejection of his first application for refugee status was ever heard.

[5] "Psychological Report" of Forensic Psychologist Elizabeth Warren, dated 19 August 1993.

[6] "Confidential Psychiatry Report" of Dr. Patrick McGorry MB BS, PhD, MRCP (UK), FRANZCP, dated 4 March 1994. In summary, the mental state examination revealed "a very distressed man", on tranquillizers, describing "disturbed behaviour" and "persecutory ideation" with clearly impaired memory and concentration. His mood was of "anxiety tension and

disphoria". The expert considered the author to be suffering from "a mixed anxiety and depressive state", meeting the criteria for "major depressive disorder" with "severe anxiety symptoms". A delusional disorder could not be ruled out.

[7] "Confidential Psychiatry Report" of Dr. Patrick McGorry, dated 27 June 1994.

[8] Psychiatric Report by Dr. Douglas R. Bell, Senior Registrar Psychiatry, Department of Human Services.

[9] Confidential Psychiatric Report, dated 29 January 1997, by Professor Patrick McGorry, Center for Young People's Mental Health. He found: "Prior to his detention there had been no evidence of a psychiatric illness whatsoever and the stress of the detention centre experience and the uncertainty about his future which was extreme given the duration of his detention had precipitated a severe psychotic illness." "[H]e would not have developed this serious psychiatric disorder had he not been placed in extended and indeterminate detention." "[He] has come in contact with the criminal justice system purely as a result of developing a psychiatric illness which produced delusional beliefs upon which he acted." In light of appropriate medication, his mental state was much improved.

[10] Psychological Report, dated 5 August 1997, by Dr. Elizabeth Warren, Healy and Warren Psychologists. The report noted a willingness to comply with treatment regimes and concluded inter alia that "As the period of detention in [MDIC] increased, this man's mental state changed from one of anxiety, depression, suicidal preoccupation and suspiciousness - to one of a frankly psychotic and delusional nature."

[11] Confidential Psychiatric Report, dated 5 August 1997, by Professor Patrick McGorry, University of Melbourne. While finding the author posed, in the light of treatment, a "minimal and acceptable" level of risk, it reiterated that his trauma and morbidity "was originally produced by his prolonged and at that time indeterminate incarceration … [which] was the key factor to the triggering and onset of his severe mental illness for which he now suffers. This is particularly so since there appears to be no family history of any mental disorder and no other apparent source of vulnerability to such a disorder". On 17 December 1998, the same expert submitted another report finding inter alia that "his original illness was precipitated by his initial detention following arrival in Australia".

[12] The Tribunal found: "The evidence is … incontrovertible that the stress and anxiety of the detention and uncertainty about his future has precipitated the severe psychotic illness. During the protracted period of his immigration detention he suffered a marked deterioration in his mental health. There was no evidence of any mental illness prior to his detention in immigration custody … [H]e spent more than two years in immigration detention and was released only, it seems, because of his deteriorating mental health." *[C] v. Minister for Immigration and Ethnic Affairs* [citation deleted].

[13] Consultant Psychiatrist Barrie Kenny stated: "The consensus of those of us who have been involved with this man, is that the period of detention itself may have precipitated this delusional disorder that he has obviously suffered from. (We make that assertion on the basis of the complete absence of any prior symptomatology, the fact that he had functioned well in Iran as an Accountant and that when his delusional material is under control, he functions and presents himself very well indeed)."

[14] On this point, the AAT was satisfied "that the reason [the author] no longer has delusional thoughts and is thinking more clearly about the current place of people such as [his victim] in his life has been his treatment with the drug Clorazil" and that "the likelihood of [the author] re-offending and so endangering the community, are so small as to be negligible while he remains on Clorazil"; "The drug Clorazil has been successful".

[15] The author had actually become eligible for parole in July 1997, but the Parole Board deferred its decision due to the deportation proceedings set in train by the Minister. The Parole Board had before it a Psychiatric Report, dated 16 March 1998, it had requested from Consultant Psychiatrist Barrie Kenny stating inter alia "The fact that he developed this psychotic state, in detention, without a prior relevant history, strongly suggests that his psychotic state may well have been precipitated by the experience of prolonged detention."

[16] On this issue, the Court found: "Given the findings of the AAT concerning what would be likely to happen to the applicant on return to Iran and its findings that a return to a psychotic state would be likely to bring him to the attention of the authorities and further, given that because of his ethnicity and religion he may lose his freedom, I find that the AAT's conclusion that the [author] does not have the protection of article 33 (1) of the Convention so unreasonable that no reasonable tribunal could so conclude. The AAT outlined circumstances where the [author], if returned to Iran, may, as a result of being ill, bring himself to the attention of the authorities and be incarcerated, at least in part as a result of those authorities discovering that he is an Assyrian Christian. It is absurd for the AAT to contend that the [author's] freedom would not thereby be threatened on account of his race and religion. Of course the trigger for the persecution may be his mental state, but once there exists the likelihood of persecution which is in part on account of a Convention based reason it matters little that the triggering of the persecution was a matter which is extraneous to a Convention based reason." *[C] v. Minister for Immigration and Multicultural Affairs* [citation deleted].

[17] The Court accepted, nonetheless, that the author's "illness developed as a result of his detention pending the determination of his application for a protection visa. That application was ultimately determined in his favour. The illness was a significant factor causing [the author] to commit the crimes which gave rise to his liability to deportation". *Minister for Immigration and Multicultural Affairs v. [C]* [citation deleted].

[18] It is not clear whether this was, or included, a decision on the request for revocation of the deportation order still pending from the Minister's deferral of that question on 15 October 1999.

[19] See notes 5, 6, 7, 8, 9, 10, 11, 13 and 15, supra.

[20] This is clarified by his subsequent (final) submissions of 21 September 2001. See paragraph 5.3 (with note 57), paragraph 6.3 and paragraphs 6.5 to 6.8.

[21] *ARJ v. Australia* (No. 692/1996) and *T. v. Australia* (No. 706/1996), coupled with general comment 20 on article 7.

[22] In this connection the author supplies reports, dated 14 December 1994, 1 August 1997, and 19 November 1999, by Dr. Colin Rubinstein, Senior Lecturer in Middle East Politics (Monash University) and member of Victorian Ethnic Affairs Commission, detailing "real and effective discrimination against Christians", "effective intimidation", "the fiercest campaign since 1979 against the small Christian minority", including killings of clerics and arrests of apostates and a "gradual eradication of existing churches under legal pretences". The situation for minorities, including Christians, is "clearly degenerating" and "deteriorating rapidly". Accordingly, the author could expect a "high probability of vindictive retaliation" and "real persecution" in the event of his return.

[23] No. 560/1993.

[24] This is clarified by his subsequent (final) submissions of 21 September 2001. While the initial complaint appears confined to the initial period of detention, the State party's main submissions also address the second detention from the perspective of article 9 (see especially paragraphs 4.22-4.24 and 4.32-4.35).

[25] *Vuolanne v. Finland* No. 265/1987.

[26] Op. cit.

[27] *N.S. v. Canada* No. 29/1978.

[28] McGoldrick, G. (1991), *The Human Rights Committee: Its role in the development of the International Covenant on Civil and Political Rights*, Clarendon Press, Oxford; Nowak M. (1993), *United Nations Covenant on Civil and Political Rights: CCPR Commentary*, Engel, Kehl. Thus, acts previously found by the Committee to constitute torture include systematic beatings, electro-shocks, submersion in a mixture of water, blood and human waste, burns, and simulated executions or amputations. (*Grille Motta v. Uruguay* No. 11/1977; *Burgos v. Uruguay* No. 52/1979; *Sendic v. Uruguay* No 63/1979; *Angel Estrella v. Uruguay* No. 74/1980; *Herrera Rubio v. Colombia* No. 161/1983; and *Lafuente v. Bolivia* No. 176/1984.)

[29] Violations have been found in the following categories of situations: direct assaults on persons, harsh conditions of detention, imposition of extended solitary confinement and inadequate medical and psychiatric treatment for detainees, with examples being administering severe corporal punishments (amputation, castration, sterilization, blinding and so forth), systematic beatings, electro shocks, burns, extended hanging from hand and/or leg chains, standing for great lengths of time, threats, detaining people bound and blindfolded, subjecting detainees to cold, giving detainees little to eat, detaining people incommunicado, as well as

aggravated forms of carrying out a death sentence. See *Carballal v. Uruguay* No. 33/1978; *Massiotti v. Uruguay* No. 25/1978; *Bequio v. Uruguay* No. 88/1981; *Cariboni v. Uruguay* No. 159/1983; and *Portorreal v. Dominican Republic* No. 188/1984.

[30] Such acts include arbitrary detention practices aimed at humiliating prisoners and making them feel insecure (for example, repeated solitary confinement, submission to cold and persistent relocation to a new cell): *Conteris v. Uruguay* No. 139/1983, and women prisoners hanging naked from handcuffs: *Isoriano de Bouton v. Uruguay* No. 37/1978 and *Arzuaga Gilbao v. Uruguay* No. 147/1983.

[31] Op. cit., at 9.2.

[32] *Graham v. Jamaica* No. 461/1991; *Kindler v. Canada* No. 470/1991; *Johnson v. Jamaica* No. 588/1994; *Chaplin v. Jamaica* No. 596/1994.

[33] Davidson, G.C. and Neale, J.M. (1994), *Abnormal Psychology (6th ed.)*, John Wiliey & Sons, Brisbane; Gottesman, I.I., McGuffin, P. and Farmer, A.E. (1987), Clinical genetics as "clues" to the real genetics of schizophrenia, *Schizophrenia Bulletin*, 13, 23-47; Dworking, R.H., Lenzenwenger, M.F. and Moldin, S.O. (1987), Genetics and the phenomenology of schizophrenia. In P.D. Harvey and E.F. Walker (Eds.), *Positive and negative symptoms of psychosis*, Elrbaum, Hillsdale, NJ; Gottesman, I.I. and Shields, J. (1972), *Schizophrenia and genetics: A twin study vantage point*, Academic Press, New York; Rosenthal, D. (1970), *Genetic theory and abnormal behaviour*, McGraw-Hill, New York; and Fischer, M. (1971), Psychosis in the off-spring of schizophrenic monozygotic twins and their normal co-twins, *British Journal of Psychiatry*, 118, 43-52.

[34] CCPR general comment 20; 10/04/92, para. 9.

[35] *ARJ v. Australia* No. 692/1996.

[36] *Kindler v. Canada*, op. cit., *Cox v. Canada* No. 539/1993; CCPR general comment 20, 10/04/92.

[37] Op. cit.

[38] Ibid.

[39] Hathaway, J.C. (1991), *The law of refugee status*, Butterworths, Toronto; Goodwin-Gill, G.S. (1996), *The refugee in international law (2nd ed.)*, Clarendon Paperbacks, Oxford.

[40] Goodwin-Gill, G.S. (1996), *The refugee in international law (2nd ed.)*, Clarendon Paperbacks, Oxford.

[41] See, supra, note 22.

[42] E/CN.4/2000/35.

[43] The State party cites the 17 September 2000 visit of President Khatami to an Assyrian church, stating that he wished to work towards "resolving differences and working towards all Iranians, Muslims or non-Muslims, to live together hand in hand and to benefit from the joys of a decent honourable life" (IRNA, 17 September 2000), the recent praise of an Iranian Archbishop for Iranian officials for safeguarding religious freedoms for ethnic minorities (IRNA, 30 July 2000), and the fact that in 1998 President Khatami was guest of honour at the Assyrian Universal Alliance annual conference.

[44] E/CN.4/2000/35.

[45] This is confirmed by the *travaux préparatoires* for the drafting of article 9, paragraph 1, reveal that the drafters explicitly contemplated detention of non-citizens for immigration control as an exception to the general rule that no person shall be deprived of his or her liberty.

[46] In *A. v. Australia*, op cit., the length of a period of immigration detention was a factor in assessing the detention as arbitrary, for "detention should not continue beyond the period for which the State can provide appropriate justification".

[47] Response of the Australian Government, at paragraph 5, to the Views of the Committee in *A. v. Australia*.

[48] Ibid.

[49] Submission by the Australian Government on Merits of *A. v. Australia*.

[50] The High Court has also determined that the mandatory detentions provisions are reasonable in terms of the domestic constitutional order: *Lim v. Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1.

[51] S.75 (v) of the Constitution, and the writ of habeas corpus. It points to the High Court's consideration of the rationale of detention in coming to the conclusion that analogous mandatory detention provisions were constitutional in *Lim v. Minister for Immigration* , op. cit..

[52] No. 373/1989.

[53] *RT v. France* No. 262/1987, and *Vicente v. Colombia* No. 612/1995.

[54] *Ellis v. Jamaica* No. 276/1988.

[55] The author cites the rejection by the Executive of two recent reports by HREOC finding aspects of the State party's asylum policy in breach of international standards.

[56] *Lim v. Australia*, op. cit..

[57] See note 17 for references to the original reports. The additional psychiatric report, dated 7 May 2001, by Associate Professor Harry Minas, Centre for International Mental Health, found that "While genetic factors are important in conferring a predisposition to the development of such illness, it is very often the case that such an illness is precipitated by extreme stress. The

stress of prolonged detention, drawn out legal proceedings, and uncertainty as to his fate would be sufficient to precipitate such an illness in a person with the necessary predisposition." The author was now considered to have been "clinically well for at least two, possibly three, years".

[58] Supra, at paragraph 2.6.

[59] E/CN.4/2001/39.

[60] Reports by Prof. McGorry, dated 17 March 2000, Dr. Kenny, 7 March 2000, and Dr. Kulkarni, 10 March 2000.

[61] Associate Professor Harry Minas, Centre for International Health, 7 May 2001 (see note 57, supra).

[62] Op cit.

[63] In *Maille v. France* (689/1996), the communication was held inadmissible for failure to exhaust administrative remedies.

[64] Op cit.

[65] Op cit.

[66] The author again cites *Ellis v. Jamaica*, op. cit.

[67] In *Dougoz v. Greece* (Appln. 40907/98, judgement of 6 March 2001), the European Court of Human Rights held that detention conditions of an asylum-seeker, including the inordinate length of detention, amounted to inhuman and degrading treatment. It also found the detention to be arbitrary, and that there was no effective remedy available by which the lawfulness of detention could be challenged. Similarly, in *Saasi v. Secretary of State (Home Department)* (High Court of the United Kingdom, judgement of 7 September 2001), mandatory detention of asylum-seekers without justification in each individual case was found to be arbitrary.

[68] *Lim v. Australia* (1992) 176 CLR 1 (HCA).

[69] *A. v. Australia*, op. cit., at paragraph 9.4.

APPENDIX

Individual opinion of Committee member Sir Nigel Rodley

I agree with the Committee's findings in respect of the violations of articles 9, paragraph 1, and 7. Having found a violation of article 9, paragraph 1, however, the Committee unnecessarily also concluded that a violation of article 9, paragraph 4, was involved, using language tending to construe a violation of article 9, paragraph 1, as ipso jure "unlawful" within the meaning of article 9, paragraph 4. In this the Committee followed the trail it blazed in *A. v. Australia* (560/1993).

In my view this was too broad a trail. Nor was it justified by the text of the Covenant. "Arbitrary" in article 9, paragraph 1, certainly covers unlawfulness. It is evident from the very notion of arbitrariness and the preparatory work. But I fail to see how the opposite is also true. Nor is there anything in the preparatory work to justify it. Yet this is the approach of *A. v. Australia*, seemingly reaffirmed by the Committee in the present case.

It does not follow from this difficulty with the Committee's approach that I necessarily take the view that article 9, paragraph 4, can never be applied in a case in which a person is detained by a State party as long as legal formality is respected. I could, for example, imagine that torture of a detainee could justify the need for recourse to a remedy that would question the continuing legality of the detention.

My present argument is simply that the issue did not need addressing in the present case, especially in the light of the fact that the absence of the possibility of a judicial challenge to the detention forms part of the Committee's reasoning in finding a violation of article 9, paragraph 1.

(*Signed*): Nigel Rodley

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Mr. David Kretzmer

The Committee has taken the view that lack of any chance of substantive judicial review is one of the factors that must be taken into account in finding that the author's continued detention was arbitrary, in violation of the author's rights under article 9, paragraph 1, of the Covenant. Like my colleague, Nigel Rodley, I am of the opinion that in these circumstances there was no need to address the question of whether the lack of such review also involved a violation of article 9, paragraph 4.

(*Signed*): David Kretzmer

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee members Mr. Nisuke Ando, Mr. Eckart Klein and Mr. Maxwell Yalden (dissenting in part)

While we agree with the Committee's finding of a violation of article 9, paragraphs 1 and 4, we are not convinced by the finding that article 7 of the Covenant was also violated by the State party.

The Committee found violations of article 7 for two reasons. The first is set out in paragraph 8.4 of the Committee's Views, on the basis of an assessment of the author's prolonged detention after it had become apparent that "there was a conflict between the author's continued detention and his sanity". We find it difficult to follow this reasoning. Although it is true that the author's mental health deteriorated until his release from detention into his family's custody on 10 August 1994, we cannot find a violation of article 7, since such a conclusion would expand the scope of this article too far by arguing that the conflict between the author's continued detention and his sanity could only be solved by his release - and that the State party would otherwise be in violation of the said provision. The circumstances of the case show that the author was psychologically assessed and under permanent observation. The fact that the State party did not immediately order his release, but decided only on the basis of a psychiatric report dated June 1994 unequivocally recommending release and external treatment (see paragraph 2.5) cannot be considered, in our view, to amount to a violation of article 7 of the Covenant.

We likewise hold that the second ground on which the Committee has based its finding of a violation of article 7 (para. 8.5) is not sound. The Committee's assessment is put together on the basis of several arguments, none of which is persuasive, either taken alone or together. We do not believe that the State party failed to support its conclusion that the author, as an Assyrian Christian, would not suffer persecution if deported to Iran. We refer in this regard to paragraphs 4.13 to 4.19 of the Committee's Views. Concerning the argument that the author would not receive effective medical treatment in Iran, we refer to the State party's submissions set out in paragraphs 4.20 and 4.21 of the Committee's Views. We do not see how these detailed arguments could be so lightly set aside in favour of an article 7 violation as has been done by the majority.

(*Signed*): Nisuke Ando

(*Signed*): Eckart Klein

(*Signed*): Maxwell Yalden

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

S. Communication No. 908/2000, *Evans v. Trinidad and Tobago*[*] (Views adopted on 21 March 2003, seventy-seventh session)

Submitted by:	Mr. Xavier Evans (represented by counsel Mr. Saul Lehrfreund)
Alleged victim:	The author
State party:	Trinidad and Tobago
Date of communication:	16 November 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 March 2003,

Having concluded its consideration of communication No. 908/2000, submitted to the Human Rights Committee on behalf of Mr. Xavier Evans under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Xavier Evans, a national of Trinidad and Tobago, currently serving a life sentence in a prison in Arouca. He claims to be a victim of violations by Trinidad and Tobago of articles 2, paragraph 3, 7, 9, paragraph 3, 10, paragraph 1, 14, paragraphs 1, 3 (c), and 5, of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as presented by the author

2.1 On 17 March 1986, the author was arrested for murder alleged to have been committed on 28 February 1986 and was subsequently charged with murder. Following a Preliminary Inquiry conducted before a Magistrate's Court, the trial took place before the High Court of

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

The text of an individual opinion signed by the Committee member Ms. Ruth Wedgwood is appended to the present document.

Justice of San Fernando between 22 June 1988 and 4 July 1988, and the author was convicted of murder and sentenced to death. On 4 January 1994, the death sentence was commuted to life imprisonment for the rest of his "natural life".

2.2 On 26 April 1994, the Court of Appeal of the Republic of Trinidad and Tobago dismissed his appeal against his conviction and sentence. The author was represented by court-appointed counsel during his trial and appeal. On 21 March 1997, the author lodged a petition for special leave to appeal to the Judicial Committee of the Privy Council in London. Leave was granted. The appeal was heard but was dismissed on 17 December 1998.

2.3 During the five years and six months that the author spent on death row, he was detained in solitary confinement in a cell measuring 9 by 6 feet containing a steel bed, table and bench. There was no integral sanitation and he was provided with a plastic pail for use as a toilet, which he was allowed to empty twice a day. There was no natural lighting. The only light was provided by a fluorescent strip light illuminated 24 hours a day located outside his cell above the door. He was allowed out of the cell on average once or twice a week for exercise and was restrained in handcuffs for the duration of this period. Food was inadequate and almost inedible. No provisions were made for his particular dietary requirements. He was provided with fresh water twice a day, when available. Requests for a doctor or dentist were infrequently granted. In support of these allegations, the author refers to an article in a national newspaper, dated 5 March 1995, in which the General Secretary of the Prison Officers' Association, was quoted, among other things, as stating that "the conditions are highly deplorable, unacceptable and pose a health hazard". The author submits that in the same article the General Secretary stated that limited resources, the spread of communicable diseases, such as chicken pox, tuberculosis and scabies, also makes the job of the prison officer more harrowing.[1] The author also submits that the medical officer failed to respond to complaints or take any steps to alleviate the intolerable sanitary conditions in the prison.

The complaint

3.1 The author claims that 26 months passed between the date of the murder and the author's trial, although the issues involved in the case were not complex. According to him, this period was unreasonably protracted. He contends that this delay deprived him of his right to a trial within a reasonable time in violation of articles 9, paragraph 3, and 14, paragraph 3 (c), of the covenant.[2] In assessing whether the period of delay is reasonable, the author submits that it is relevant to consider the effect of the delay on the fairness of the trial. The author alleges that his defence was one of alibi and that the identification evidence was suggested or mistaken.

3.2 The author also claims that there was a delay of five years and nine months between his conviction and the hearing of his appeal. He submits that his right to appeal, as guaranteed in article 14, paragraphs 3 (c) and 5, of the Covenant, has been violated.[3] In this context, the author submits that it is relevant to consider the fact that he was under sentence of death throughout this entire period, and to take into account his conditions of confinement on death row.

3.3 The author claims that the inadequate conditions of confinement during his five years on death row constitute cruel, inhuman and degrading treatment in violation of articles 7 and 10, paragraph 1, of the Covenant. These conditions are said to have been repeatedly condemned by international human rights organizations as breaching internationally accepted standards of minimum protection. The author submits that the conditions to which he was subjected also violated the United Nations Standard Minimum Rules for the Treatment of Prisoners.

3.4 The author submits that his rights guaranteed in article 14, read together with article 2, paragraph 3, of the Covenant, have been violated. He claims that he was denied the right of access to court, as the law provided no opportunity to argue against imposition of a mandatory death sentence.

3.5 The author also claims that his rights under article 14, read together with article 2, paragraph 3, of the Covenant were violated as when his death sentence was commuted to life imprisonment, he was denied any opportunity to make representations before the sentence was commuted.

3.6 Finally, the author claims a violation of article 14, read together with article 2, paragraph 3 of the Covenant because a subsequent constitutional challenge to the High Court in relation to the length of the term imposed was not open to him as legal aid is not provided for such motions and the costs involved are beyond the means of the author. He states that an originating motion pursuant to article 14 (1) of the Constitution, could have been lodged on the basis that his life imprisonment for the rest of his "natural life" is arbitrary and cruel. However, because of the lack of legal aid for Constitutional Motions, the author claims that he is effectively barred from exercising his constitutional right to seek redress for the violation of his rights. He cites the Human Rights Committee's decision in *Currie v. Jamaica*[4] for the proposition that remedies in the Constitutional Court should be available and effective and in the context of a review of irregularities in a criminal trial legal assistance should be provided to those who have not the means to take such an action. He also cites jurisprudence from the European Court of Human Rights[5] for the proposition that effective right of access to a court may require the provision of legal aid for indigent applicants.

3.7 As to the admissibility of the communication, the author states that he has exhausted all effective and available domestic remedies. He contends that as regards the allegations concerning pre-trial delay or trial within a reasonable time, these complaints could not have been brought before the domestic courts of the State party. The author refers to two domestic cases in which it was decided that pre-trial delay does not constitute a competent ground of appeal, where no prejudice to the fairness of the trial can be shown, and that the Constitution of Trinidad and Tobago does not provide for a right to a speedy trial or trial within a reasonable time. In addition, the author contends that he cannot be expected to pursue a Constitutional Motion before the Constitutional Court of the Republic of Trinidad and Tobago, as he lacks private means and legal aid is not available to him.[6]

The State party's submissions on admissibility and merits

4.1 The communication with its accompanying documents was transmitted to the State party on 19 January 2000. The State party has not responded to the Committee's request, under rule 91 of the rules of procedure, to submit information and observations in respect of the admissibility and merits of the communication, despite reminders addressed to it on 26 February and 11 October 2001.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering the claims contained in the communication, the Human Rights Committee must, in accordance with rule 87 of the rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant. The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party examine in good faith all the allegations brought against it, and that it provide the Committee with all the information at its disposal. In light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that they have been substantiated.

5.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. With respect to the exhaustion of domestic remedies, the Committee notes that the State party has not claimed that there are any domestic remedies yet to be exhausted by the author and therefore the Committee finds that the author has exhausted domestic remedies.

5.3 As to whether the author has fulfilled all other admissibility criteria, the Committee notes that with respect to the author's claim that the mandatory character of the death sentence constitutes a violation of article 14, paragraph 1, of the Covenant, on the ground that the law provides no opportunity to attempt to mitigate the sentence (para. 3.4), the Committee refers to its Views in the cases of *Thompson v. St. Vincent and the Grenadines*[7] and *Kennedy v. Trinidad and Tobago*[8] where it was established that mandatory capital punishment for certain categories of crime may constitute a violation of article 6, paragraph 1. However, contrary to the situation in those cases the author's death sentence in the present communication was commuted in 1994, that is several years before he submitted his case to the Committee. In the circumstances, the Committee considers that the application of mandatory capital punishment in his case does not give rise to a claim under the Optional Protocol. Consequently, the Committee considers that this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.4 With respect to the other claims made by the author in paragraphs 3.1, 3.2, 3.3, 3.5 and 3.6, on the basis of the information before it, the Committee is of the view that these parts of the communication are admissible and proceeds to a consideration of the merits.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

6.2 As to the claim of unreasonable pre-trial delay, the Committee observes that the relevant dates, for the purpose of determining the length of the delay in the author's case, are the dates between the author's arrest and trial and not, as the author claims, between the date of the alleged crime, that is to say the date of the murder, and the date of the author's trial. In this regard, the Committee observes that, although there appears to be some confusion in the explanations provided by the author's counsel as to the date of the author's arrest, it is abundantly clear from the trial transcript that the author was arrested on 17 March 1986 and not 17 March 1988 (see paragraph 2.1 and note 1). Consequently, the Committee considers that a delay of two years and three months between the author's arrest and his trial, which has remained unexplained by the State party, constitutes a violation of the author's right under article 9, paragraph 3, of the Covenant to be tried within a reasonable time or to release, subject however to conditions, and equally of the author's right under article 14, paragraph 3 (c), of the Covenant to be tried without undue delay.

6.3 As to the claim of a delay of five years and nine months between conviction and the dismissal of his appeal by the Court of Appeal of the Republic of Trinidad and Tobago, which has also remained unexplained by the State party, the Committee recalls its jurisprudence that the rights contained in article 14, paragraphs 3 (c), and 5, read together, confer a right to review of a decision at trial without delay.[9] In *Johnson v. Jamaica,*[10] the Committee considered that, barring exceptional circumstances, a delay of 4 years and 3 months was unreasonably prolonged. As a result of these considerations, the Committee finds a violation of article 14, paragraphs 3 (c), and 5, of the Covenant.

6.4 As to the claim that the conditions of detention to which the author was subjected during his period on death row violated articles 7 and 10, paragraph 1, the Committee notes that, in the absence of any explanation from the State party, it must give due weight to the author's allegations. The Committee notes that the author was detained in solitary confinement on death row for a period of five years in a cell measuring 6 by 9 feet, with no sanitation except for a slop pail, no natural light, being allowed out of his cell only once or twice a week during which he was restrained in handcuffs, and with wholly inadequate food that did not take into account his particular dietary requirements. The Committee considers that these - uncontested - conditions of detention, taken together, amount to a violation of article 10, paragraph 1, of the Covenant. In light of this finding, in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary separately to consider the claims arising under article 7 of the Covenant.

6.5 As to the author's claim that he was denied access to the courts by not being allowed to make representations when his death sentence was commuted to life imprisonment for his "natural life", the Committee recalls its jurisprudence in *Kennedy v. Trinidad and Tobago,*[11] in which it decided that State parties retain discretion for spelling out the modalities of the exercise of the right to seek commutation of the sentence of death (art. 6, para. 4) and that this right is not governed by the procedural guarantees of article 14. The Committee finds therefore that the author has not shown that his inability to make representations on the commutation of his sentence is such as to violate any of his rights protected under the Covenant.

6.6 As to the claim that he was denied access to the courts in not being provided with legal aid to make a constitutional challenge on the issue of the length of the sentence imposed upon commutation, the Committee recalls its prior jurisprudence[12] that the Covenant does not contain an express obligation as such for any State party to provide legal aid to individuals in *all* cases but only in the determination of a criminal charge where the interest of justice so require. The Committee is therefore of the view that the State party is not expressly required to provide legal aid outside the context of a criminal trial. As the author's claim relates to the commutation of his sentence rather than the fairness of the trial itself, the Committee cannot find that there has been a violation of article 14, paragraph 1, of the Covenant, in this respect.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose violations of articles 9, paragraph 3, 14, paragraphs 3 (c) and 5, and 10, paragraph 1, of the International Covenant on Civil and Political Rights.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including consideration of early release. As long as the author is in prison he should be treated with humanity and not subjected to cruel, inhuman or degrading treatment. The State party is also under an obligation to ensure that similar violations do not occur in the future.

9. On becoming a party to the Optional Protocol, the State party recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before the State party's denunciation of the Optional Protocol became effective on 27 June 2000; in accordance with article 12, paragraph 2 of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] In further support of these allegations, the author provides newspaper articles on prison conditions, an affirmation from counsel who visited the prison in question and who supplied in his affirmation information on prison conditions as described by inmates. The author was not one of these inmates.

[2] The author refers to the case of *Lilian Celiberti de Casariego v. Uruguay*, Case No. 56/1979, Views adopted on 29 July 1981, *Millan Sequeira v. Uruguay*, Case No. 6/1977, Views adopted on 29 July 1980, *Pinkney v. Canada*, Case No. 27/1979, Views adopted 29 October 1981, *Smart v. Trinidad and Tobago*, Case No. 672/1995, Views adopted on 29 July 1998, as well as jurisprudence of the Inter-American Commission of Human Rights where two years and four months was held to be a violation of article 7, paragraph 5, of the American Convention on Human Rights.

[3] The author refers to *Pinkney v. Canada*, op. cit., *Little v. Jamaica*, Case No. 283/1998, Views adopted on 11 November 1991, *Pratt and Morgan v. Jamaica*, Case Nos. 210/1986 and 225/1987, Views adopted on 6 April 1989, *Kelly v. Jamaica*, Case No. 253/1987, Views adopted on 17 July 1996, *Neptune v. Trinidad and Tobago*, Case No. 523/1992, Views adopted on 16 July 1996.

[4] Communication No. 377/1989, Views adopted on 29 March 1994, where the Committee found that "where a convicted person seeking constitutional review of the irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his constitutional remedy and where the interests of justice so require, legal assistance should be provided by the State. In the present case the absence of legal aid has denied to the author the opportunity to test the irregularities of his criminal trial in the Constitutional Court and a fair hearing, and is thus a violation of article 14, paragraph 1, juncto article 2, paragraph 3".

[5] *Golder v. UK* [1975] 1 EHRR 524, and *Airey v. Ireland* [1979] 2 EHRR 305.

[6] In this regard, the author refers to the following cases of the Human Rights Committee: *Little v. Jamaica*, op. cit.; *Reid v. Jamaica*, Case No. 250/1987, Views adopted on 20 July 1990; *Collins v. Jamaica*, Case No. 356/1989, Views adopted on 25 March 1993; *Smith v. Jamaica*, Case No. 282/1988, Views adopted on 31 March 1993; and *Smart v. Trinidad and Tobago*, op. cit.

[7] Case No. 806/1998, Views adopted on 18 October 2000.

[8] Case No. 845/1998, Views adopted on 26 March 2002.

[9] *Lubuto v. Zambia*, Case No. 390/1990, Views adopted on 31 October 1995 and *Neptune v. Trinidad and Tobago*, op. cit.

[10] Case No. 588/1994, Views adopted on 22 March 1996.

[11] Op. cit.

[12] *Kennedy v. Trinidad and Tobago*, op. cit.

Individual opinion of Committee member Ms. Ruth Wedgwood (concurring in part, dissenting in part)

Per the parallel opinion of Messrs. Nisuke Ando, Eckart Klein, and David Kretzmer in *Kennedy v. Trinidad and Tobago*, Case No. 845/1998, in the instant case I would respect the State party's reservation of 26 May 1998, upon its reaccession to the Optional Protocol. The reservation provides as follows:

> "… Trinidad and Tobago re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 1 thereof to the effect that the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected herewith."

The author's communication to the Committee in the instant case is dated 16 November 1999, after the State party's reservation took effect. Commutation of the death sentence in this case in 1994 does not evidently displace the effect of the reservation.

In my view, it is important for the Committee to respect State party reservations, which are conditions to their consent to the Optional Protocol. Even if one shares the view that the Committee should independently judge the consistency of State reservations with the object and purpose of the Optional Protocol, and concludes that Trinidad and Tobago's reservation fails that test, nonetheless States parties are entitled under general international law and the law of treaties to condition their consent to be bound to a treaty, including the Optional Protocol, upon the acceptance of a reservation. To that extent, I disagree with the earlier view of the Committee in general comment No. 24 (1994). The failure of the State party to cooperate with the Committee in the examination of the merits in this case and in the earlier case of *Kennedy v. Trinidad and Tobago* may bear some relation to the disregard of its reservation. (Indeed, the same problem may account for the State party's decision to denounce and withdraw from the Optional Protocol altogether, effective 23 July 2000, which is a step permitted to State parties under article 12 of the Optional Protocol. That denunciation is not formally applicable in this case.)

Since the Committee has found the instant communication to be admissible, I would agree on the merits that the jail conditions on death row, as alleged by the author, appear to have been seriously deficient. The United Nations Standard Minimum Rules for the Treatment of Prisoners note that some countries face challenges of budget and resources. Nonetheless, these are "minimum conditions which are accepted as suitable by the United Nations". The conditions in which the author was confined during his years on death row did not meet the requirements of, inter alia, paragraphs 11 (a), 20 (1), and 21 (1) of the United Nations Standard Minimum Rules. These standards properly inform the Committee's construction of article 10 (1) of the Covenant on Civil and Political Rights.

(*Signed*): Ruth Wedgwood

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

T. Communication No. 933/2000, *Adrien Mundyo Busyo, Thomas Osthudi Wongodi, René Sibu Matubuka et al. v. Democratic Republic of the Congo**
(Views adopted on 31 July 2003, seventy-eighth session)

Submitted by:	Adrien Mundyo Busyo, Thomas Osthudi Wongodi, René Sibu Matubuka et al.
Victims:	Adrien Mundyo Busyo, Thomas Osthudi Wongodi, René Sibu Matubuka et al.
State party:	Democratic Republic of the Congo
Date of communication:	17 December 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 July 2003,

Having concluded its consideration of communication No. 933/2000, submitted by Adrien Mundyo Busyo, Thomas Osthudi, René Sibu Matubuka et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors are Adrien Mundyo Busyo, Thomas Osthudi Wongodi and René Sibu Matubuka, citizens of the Democratic Republic of the Congo, acting on their own behalf and on behalf of 68 judges who were subjected to a dismissal measure. They claim to be the victims of a violation by the Democratic Republic of the Congo of articles 9, 14, 19, 20 and 21 of the International Covenant on Civil and Political Rights. The communication also appears to raise questions under article 25 (c) of the Covenant.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The facts as submitted by the authors

2.1 Under Presidential Decree No. 144 of 6 November 1998, 315 judges and public prosecutors, including the above-mentioned authors, were dismissed on the following grounds:

> "The President of the Republic;
>
> Having regard to Constitutional Decree-Law No. 003 of 27 May 1997 on the organization and exercise of power in the Democratic Republic of Congo, as subsequently amended and completed;
>
> Having regard to articles 37, 41 and 42 of Ordinance-Law No. 88-056 of 29 September 1988 on the status of judges;
>
> Given that the reports by the various commissions which were set up by the Ministry of Justice and covered the whole country show that the above-mentioned judges are immoral, corrupt, deserters or recognized to be incompetent, contrary to their obligations as judges and to the honour and dignity of their functions;
>
> Considering that the conduct in question has discredited the judiciary, tarnished the image of the system of justice and hampered its functioning;
>
> Having regard to urgency, necessity and appropriateness;
>
> On the proposals of the Minister of Justice;
>
> Hereby decrees:
>
> Article 1:
>
> The following individuals are dismissed from their functions as judges …".

2.2 Contesting the legality of these dismissals, the authors filed an appeal, following notification and within the three-month period established by law, with the President of the Republic to obtain the withdrawal of the above-mentioned decree. Having received no response, in accordance with Ordinance No. 82/017 of 31 March 1982 on procedure before the Supreme Court of Justice, the 68 judges all referred their applications to the Supreme Court during the period from April to December 1999. According to the information provided by the authors, it appears, first of all, that the Attorney-General of the Republic, who was required to give his views within one month, deliberately failed to transmit the report[1] by the Public Prosecutor's Office until 19 September 2000 in order to block the appeal. Moreover the Supreme Court, by a ruling of 26 September 2001, decided that Presidential Decree No. 144 was an act of Government inasmuch as it came within the context of government policy aimed at raising moral standards in the judiciary and improving the functioning of one of the three powers of the State. The Supreme Court consequently decided that the actions taken by the President of the Republic, as the political authority, to execute national policy escaped the control of the administrative court and thus declared inadmissible the applications by the authors.

2.3 On 27 and 29 January 1999, the authors, who formed an organization called the "Group of the 315 illegally dismissed judges", known as the "G.315", submitted their application to the Minister for Human Rights, without results.

2.4 The authors also refer to various coercive measures used by the authorities to prevent them from pressing their claims. They mention two warrants for the arrest of Judges René Sibu Matubuka and Ntumba Katshinga.[2] They explain that, following a meeting on the decree in question which was held between the G.315 and the Minister of Justice on 23 November 1998, the Minister withdrew the two warrants. The authors add that, further to their follow-up letter to the Minister of Justice concerning the lack of action taken following their meeting on the decree, Judges René Sibu Matubuka and Benoît Malu Malu were arrested and detained from 18 to 22 December 1998 in an illegal detention centre in the GLM (Groupe Litho Moboti) building belonging to the Task Force for Presidential Security. They were heard by persons who had neither been sworn in nor authorized by the Attorney-General of the Republic, as required by law.

The complaint

3.1 The authors claim, first of all, to be the victims of dismissal measures that they regard as clearly illegal.

3.2 They maintain that Presidential Decree No. 144 is contrary to Constitutional Decree-Law No. 003 of 27 May 1997 on the organization and exercise of power in the Democratic Republic of the Congo and Ordinance-Law No. 88-056 of 29 September 1988 on the status of judges.

3.3 According to the authors, while the above-mentioned legislation stipulates that the President of the Republic can dismiss a civilian judge only on the proposal of the Supreme Council of the Judiciary (CSM),[3] the dismissals in question were decided on the proposal of the Minister of Justice, who is a member of the executive and thus took the place of the only body with jurisdiction in this regard, namely, the CSM. According to the authors, the law does not confer discretionary power, despite the circumstances described in Presidential Decree No. 144, i.e. urgency, necessity and appropriateness, which cannot be grounds for dismissal.

3.4 The authors also claim that the authorities failed to fulfil their obligation to respect the adversarial principle and its corollaries (which include the presumption of innocence) at all times when dealing with disciplinary matters. In fact, the authors received no warning or notification from any authority, body or commission and were, incidentally, never heard either by the inspecting magistrate or by the CSM, as required by law.

3.5 The authors maintain that, in violation of the obligation to justify any decision to dismiss a government official, Presidential Decree No. 144 cites only vague, imprecise and impersonal grounds, namely, immorality, desertion and recognized incompetence - and this, in their opinion, amounts in Congolese law to a lack of grounds. With regard to the claims of immorality and incompetence, the authors state that their personal files in the CSM secretariat prove the contrary. As to the claim of desertion, the authors assert that their departure from the places to which they were assigned was the result of war-related insecurity and that their registration with the CSM secretariat in Kinshasa, the city where they took refuge, attested to their availability as judges. They say that the CSM secretariat accorded them the treatment enjoyed by persons displaced by war.

3.6 The authors refer to the reports which were submitted to the Commission on Human Rights by the Special Rapporteur on the situation of human rights in the Democratic Republic of the Congo[4] and the Special Rapporteur on the independence of judges and lawyers[5] and in which they express concern about Presidential Decree No. 144 calling for the dismissal of the 315 judges and demonstrating that the judiciary is under the control of the executive. They also mention a statement by the head of the Office of the United Nations High Commissioner for Human Rights in the Democratic Republic of the Congo calling for the reinstatement of the dismissed judges.

3.7 Secondly, the authors are of the view that the illegal arrest, detention and interrogation of three members of their organization are abuses of power (see paragraph 2.4).

3.8 Lastly, the authors consider that they have exhausted domestic remedies. Recalling the failure of their appeals to the President of the Republic, the Minister for Human Rights and the Minister of Justice, and the ruling of the Supreme Court of Justice, of 26 September 2001, they emphasize that the independence of the judges responsible for making the ruling was not guaranteed inasmuch as the Senior President of the Supreme Court, the Attorney-General of the Republic and other senior members of the judiciary were appointed by the new regime in power, without regard for the law stipulating that such appointments must be made on the proposal of the Supreme Council of the Judiciary. They add that, when these members of the judiciary were sworn in by the President of the Republic, the Senior President of the Supreme Court disregarded his obligation of discretion and made a statement on the lawfulness of the dismissal decree. Moreover, the authors consider that the Supreme Court, in its ruling of 26 September 2001, wrongly decided that their appeal was inadmissible and thus deprived them of any remedy.

3.9 Despite the request and the reminders (notes verbales of 7 December 2000, 12 July 2001 and 15 May 2003) the Committee sent to the State party asking for a reply to the authors' allegations, the Committee has received no response.

The Committee's admissibility decision

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

4.2 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same question is not being examined under another procedure of international investigation or settlement.

4. 3 The Committee considers that the authors' complaint that the facts as they described them constitute a violation of articles 19, 20 and 21 has not been sufficiently substantiated for the purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

4.4 The Committee considers that, in the absence of any information from the State party, the complaint submitted in relation to Presidential Decree No. 144 calling for the dismissal of 315 judges, including the authors of this communication, and to the arrest and detention of

Judges René Sibu Matubuka and Benoit Malu Malu may raise questions under article 9, article 14, paragraph 1, and article 25 (c) of the Covenant which should be examined as to the merits.

Examination of the merits

5.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol. It notes that the State party has not, despite the reminders sent to it, provided any replies on either the admissibility or the merits of the communication. The Committee notes that, under article 4, paragraph 2, of the Optional Protocol, a State party is under an obligation to cooperate by submitting to it written explanations or statements clarifying the matter and the measures, if any, that may have been taken to remedy the situation. As the State party has failed to cooperate in that regard, the Committee had no choice but to give the authors' allegations their full weight inasmuch as they were adequately substantiated.

5.2 The Committee notes that the authors have made specific and detailed allegations relating to their dismissal, which was not in conformity with the established legal procedures and safeguards. The Committee notes in this regard that the Minister of Justice, in his statement of June 1999 (see paragraph 3.8), and the Attorney-General of the Republic, in the report by the Public Prosecutor's Office of 19 September 2000 (see note 1), recognize that the established procedures and safeguards for dismissal were not respected. Furthermore, the Committee considers that the circumstances referred to in Presidential Decree No. 144 could not be accepted by it in this specific case as grounds justifying the fact that the dismissal measures were in conformity with the law and, in particular, with article 4 of the Covenant. The Presidential Decree merely refers to specific circumstances without, however, specifying the nature and extent of derogations from the rights provided for in domestic legislation and in the Covenant and without demonstrating that these derogations are strictly required and how long they are to last. Moreover, the Committee notes that the Democratic Republic of the Congo failed to inform the international community that it had availed itself of the right of derogation, as stipulated in article 4, paragraph 3, of the Covenant. In accordance with its jurisprudence,[6] the Committee recalls, moreover, that the principle of access to public service on general terms of equality implies that the State has a duty to ensure that it does not discriminate against anyone. This principle is all the more applicable to persons employed in the public service and to those who have been dismissed. With regard to article 14, paragraph 1, of the Covenant, the Committee notes the absence of any reply from the State party and also notes, on the one hand, that the authors did not benefit from the guarantees to which they were entitled in their capacity as judges and by virtue of which they should have been brought before the Supreme Council of the Judiciary in accordance with the law, and on the other hand, that the President of the Supreme Court had publicly, before the case had been heard, supported the dismissals that had taken place (see paragraph 3.8) thus damaging the equitable hearing of the case. Consequently, the Committee considers that those dismissals constitute an attack on the independence of the judiciary protected by article 14, paragraph 1, of the Covenant. The dismissal of the authors was ordered on grounds that cannot be accepted by the Committee as a justification of the failure to respect the established procedures and guarantees that all citizens must be able to enjoy on general terms of equality. In the absence of a reply from the State party, and inasmuch as the Supreme Court, by its ruling of 26 September 2001, has deprived the authors of all remedies by declaring their appeals inadmissible on the grounds that Presidential Decree No. 144 constituted an act of Government, the Committee considers that, in this specific case, the facts show that there has been a violation of article 25, paragraph (c), read in conjunction with article 14, paragraph 1, on the independence of the judiciary, and of article 2, paragraph 1, of the Covenant.

5.3 Having regard to the complaint of a violation of article 9 of the Covenant, the Committee notes that Judges René Sibu Matubuka and Benoît Malu Malu were arbitrarily arrested and detained from 18 to 22 December 1998 in an illegal detention centre belonging to the Task Force for Presidential Security. In the absence of a reply from the State party, the Committee notes that there has been an arbitrary violation of the right to liberty of the person under article 9 of the Covenant.

6.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has committed a violation of article 25 (c), article 14, paragraph 1, article 9 and article 2, paragraph 1, of the Covenant.

6.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee is of the view that the authors are entitled to an appropriate remedy, which should include, inter alia: (a) in the absence of a properly established disciplinary procedure against the authors, reinstatement in the public service and in their posts, with all the consequences that that implies, or, if necessary, in similar posts;[7] and (b) compensation calculated on the basis of an amount equivalent to the salary they would have received during the period of non-reinstatement.[8] The State party is also under an obligation to ensure that similar violations do not occur in future and, in particular, that a dismissal measure can be taken only in accordance with the provisions of the Covenant.

6.3 The Committee recalls that, by becoming a State party to the Optional Protocol, the Democratic Republic of the Congo recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. Consequently, the Committee wishes to receive from the State party, within 90 days of the transmission of these findings, information about the measures taken to give effect to its views. The State party is also requested to make these findings public.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently issued in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The authors transmitted a copy of the report by the Public Prosecutor's Office. In the report, the Office of the Attorney-General of the Republic requests the Supreme Court of Justice to declare, first and foremost, that Presidential Decree No. 144 is an act of Government that is outside its jurisdiction; and, secondly, that this decree is justified because of exceptional circumstances. On the basis of accusations made by both the population and foreigners living in

the Democratic Republic of the Congo against allegedly incompetent, irresponsible, immoral and corrupt judges, as well as of the missions carried out by judges in this regard, the Attorney-General of the Republic maintains that the Head of State issued Presidential Decree No. 144 in response to a crisis situation characterized by war, partial territorial occupation and the need to intervene as a matter of urgency in order to combat impunity. He stressed that it was materially impossible for the authorities to follow the ordinary disciplinary procedure and that the urgency of the situation, the collapse of the judiciary and action to combat impunity were incompatible with any decision to suspend the punishment of the judges concerned.

[2] Dates of arrest warrants not specified.

[3] The CSM acts as a disciplinary court to enforce a penalty, which may either be disciplinary (dismissal) or criminal (imprisonment for more than three months).

[4] Document E/CN.4/1999/31 of 8 February 1999.

[5] Document E/CN.4/2000/61 of 21 February 2000.

[6] Communication No. 422/1990 *Adimayo M. Aduayom T. Diasso and Yawo S. Dobou v. Togo*; general comment No. 25 on article 25 (fiftieth session - 1996).

[7] Communications No. 630/1995 *Abdoulaye Mazou v. Cameroon*; No. 641/1995 *Gedumbe v. Democratic Republic of the Congo*; and No. 906/2000 *Felix Enrique Chira Vargas-Machuca v. Peru*.

[8] Communications Nos. 422/1990, 423/1990 and 424/1990 *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*; No. 641/1995 *Gedumbe v. Democratic Republic of the Congo*; and No. 906/2000 *Felix Enrique Chira Vargas-Machuca v. Peru*.

U. Communication No. 941/2000, *Young v. Australia**
(Views adopted on 6 August 2003, seventy-eighth session)

Submitted by:	Mr. Edward Young (represented by counsel Ms. Michelle Hannon and Ms. Monique Hitter)
Alleged victim:	The author
State party:	Australia
Date of communication:	29 June 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 6 August 2003,

Having concluded its consideration of communication No. 941/2000, submitted to the Human Rights Committee on behalf of Mr. Edward Young under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Edward Young, an Australian citizen, born on 7 May 1935 and currently residing in the state of New South Wales. He claims to be a victim of a violation by Australia of article 26 of the Covenant. He is represented by counsel.

The facts as presented by the author

2.1 The author was in a same-sex relationship with a Mr. C for 38 years. Mr. C was a war veteran, for whom the author cared in the last years of his life. He died on 20 December 1998, at the age of 73. On 1 March 1999, the author applied for a pension under section 13 of the

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

An individual opinion signed by Committee members Ms. Ruth Wedgwood and Mr. Franco Depasquale is appended to the present document.

Veteran's Entitlement Act ("VEA") as a veteran's dependant. On 12 March 1999, the Repatriation Commission denied the author's application in that he was not a dependant as defined by the Act. In its decision the Commission sets out the relevant legislation as follows:

> Section 11 of the Act states:
>
> > "dependant, in relation to a veteran (including a veteran who has died), means
> >
> > (a) the partner ..."
>
> Section 5E of the Act defines a "partner, in relation to a person who is a 'member of a couple', [as] the other member of the couple".
>
> The notion of couple is defined in section 5E (2):
>
> > "a person is a 'member of a couple' for the purposes of this Act if:
> >
> > (a) the person is legally married to another person and is not living separately and apart from the other person on a permanent basis; or
> >
> > (b) all of the following conditions are met:
> >
> > (i) the person is living with a person of the opposite sex (in this paragraph called the partner);
> >
> > (ii) the person is not legally married to the partner;
> >
> > (iii) the person and the partner are, in the Commission's opinion (...), in a marriage-like relationship;
> >
> > (iv) the person and the partner are not within a prohibited relationship for the purposes of section 23 B of the Marriage Act 1961".

The decision reads "The wording of section 5E (2) (b) (i) - the text that I have highlighted - is unambiguous. I regret that I am therefore unable to exercise any discretion in this matter. This means that under legislation, you are not regarded as the late veteran's dependant. Because of this you are not entitled to claim a pension under the Act."

The author was also denied a bereavement benefit under the Act, as he was not considered to be a "member of a couple".[1]

2.2 On 16 March 1999, the author applied to the Veterans Review Board ("VRB") for a review of the Commission's decision. On 27 October 1999, the Board affirmed the Commission's decision, finding that the author was not a dependant as defined by the Act. In its decision the Board outlines the legislation as above and considers that it "has no discretion in its application of the Act and in this case it is bound to have regard to section 11 of the Act. Hence, under the current legislation, the Board is required to affirm the decision under review in relation to the status of the applicant".

2.3 On 23 December 1999, the Human Rights and Equal Opportunity Commission ("HREOC") denied the author's complaint to that body, stating that as the author had been subjected to the automatic and non-discretionary operation of legislation, the Commission had no jurisdiction to intervene.

The complaint

3.1 The author complains that the State party's refusal, on the basis of him being of the same-sex as his partner, that is, due to his sexual orientation, to provide him with a pension benefit violates his right to equal treatment before the law and is contrary to article 26. He concedes that article 26 does not compel a State party to enact particular legislation, but argues that where it does, the legislation must comply with article 26. The author recalls that in *Broeks v. The Netherlands*[2], *Zwaan de Vries v. The Netherlands*[3], and *Danning v. The Netherlands*[4], the Committee, in principle, found social security legislation to be subject to article 26. He also recalls that in *Toonen v. Australia*[5] the Committee recognized sexual orientation as a proscribed ground for differentiation under article 26.

3.2 The author argues that although he could have appealed to the Commonwealth Administrative Appeals Tribunal ("AAT") such an appeal would have had no prospect of success, as it would also have been bound by the provisions of the VEA.

The State party's submission on the admissibility and merits of the communication

4.1 By note verbale of 1 May 2001, the State party comments on the admissibility and merits of the communication. It considers the meaning of the rights protected under article 26 and distinguishes between "equality before the law" and "equal protection of the law". The former, it contends, is not directed at legislation but rather exclusively at its enforcement and means that judges and administrative officials must not act arbitrarily in enforcing laws.[6] The latter, it argues, relates to the substance of the laws as well as their application.[7] Although the author refers to "equality before the law" in his communication, the State party does not understand this to relate to an alleged breach of this aspect of article 26. Rather than alleging arbitrary action by judges or officials, the State party understands the author to be alleging that the law itself is discriminatory, and that he raises the issue of equal protection of the law under article 26.

4.2 The State party challenges the admissibility on three grounds. *Firstly*, it argues that the author is not a victim within the meaning of article 1 of the Optional Protocol, pursuant to which the Committee has indicated[8] that an author must provide evidence that he/she is personally affected by an act or omission by the State party. Although the State party endorses the decisions of the domestic authorities rejecting the author's application for a pension, it does not endorse the reasons articulated by these bodies for so disposing of it. It argues that a thorough examination of the facts and their application to the VEA reveals that no partner of Mr. C, whether homosexual or heterosexual, would have been entitled to the pension under the VEA. Consequently, the State party argues that neither the author's sexual orientation nor the sexual orientation of Mr. C is determinative of the issue.

4.3 The State party notes that the author applied for a pension under the VEA and that the eligibility provisions are dealt with in Division 2 of Part II of the VEA. Section 13 sets out the criteria for "eligibility for pension". According to the State party, in order to prove that he has been the subject of unlawful discrimination, the author must first establish that he is able to satisfy the entitlement provisions in section 13.

4.4 The State party explains that section 13 provides five separate grounds for entitlement to the pension. In particular, section 13 (1) allows a dependant, including the partner, of a veteran to claim the pension where the veteran's death was "war-caused". The State party argues that the records of the Department of Veterans' Affairs do not show that Mr. C's death was "war-caused", nor does the author allege that his death was "war-caused". Therefore, it submits that, no heterosexual or homosexual partner of Mr. C could have been entitled to the pension under subsection (1). The State party then goes on to apply the facts of the author's case to the other subsections of article 13 in an attempt to demonstrate that regardless of relationship, the author would not have been eligible for a pension, as Mr. C was not a veteran to whom one of the requisite provisions applied. It submits that since the author was in any event not entitled to that benefit, he has not established a prima facie entitlement to the pension and therefore is not a victim for the purposes of article 1.

4.5 *Secondly*, the State party recalls the Committee's jurisprudence[9] and argues that the author has not sufficiently substantiated his case for the purposes of admissibility. To raise a prima facie case, the State party argues that the author must establish that he was denied a benefit that would have been available to a heterosexual partner of Mr. C as a matter of entitlement under law and refers back to its arguments in paragraphs 4.2 to 4.4 above. It submits that the author failed to evaluate properly all the facts of the case and the application of those facts to section 13 of the VEA, and that therefore he is unable to substantiate the claim that his lack of entitlement to the pension under the VEA is determined by a distinction based on sexual orientation in breach of article 26.

4.6 *Thirdly*, the State party argues that the author has not exhausted domestic remedies for the purposes of admissibility. In referring to the Committee's jurisprudence,[10] the State party submits that the balance of opinion in the Views of the Committee is that a remedy must have no chance of success in order for an author to successfully claim that the particular remedy does not need to be exhausted before a communication can be declared admissible.

4.7 The State party submits that the author could have appealed the decision not to grant him the pension to the AAT and provides the following information on this tribunal. The AAT was created by Federal statute and has the power to affirm or quash a decision, and to remit the matter to the original decision maker to make a new decision, vary a decision or replace the original decision with a new one. In exercising this power, the role of the AAT is to determine the "correct or preferable decision" in relation to a particular matter. In performing its functions, the AAT as a matter of course conducts a thorough examination of all the facts. The AAT is not bound to use only the information available to the original decision maker, and may consider information not known at the time of the original decision. A party to a matter heard by the AAT may seek judicial review of a decision in the Federal Court.

4.8 The State party submits that the AAT would in all likelihood have concluded that the author, like any heterosexual or homosexual partner of Mr. C, was not entitled to a pension under section 13 of the VEA. This decision would have been based on either: (1) the failure of Mr. C to meet the requirements in section 13 of the VEA upon which partner entitlement to the pension depends, in particular those relating to serious disability or death caused as a result of war service (as outlined in paragraph 4.2 to 4.4); or (2) the author's failure to provide sufficient evidence of his allegedly de facto relationship with Mr. C (the State party provides further information on this argument in the merits). The State party submits that a decision of the AAT based on either or both of these grounds would not involve any distinction upon which a breach of article 26 could be founded and this matter would not have been brought to the Committee.

4.9 On the merits, the State party argues that, notwithstanding the reasons provided by the decision-making bodies in the author's case, the sexual orientation of Messrs C and the author was not determinative of the author's entitlement to the pension, and for the purposes of the Committee's consideration of the communication, the author's allegation lacks any merit. The State party supports this submission on two grounds. Firstly, the State party alleges that no heterosexual or homosexual partner of Mr. C would have been entitled to the pension under section 13 of the VEA. Secondly, the State party submits that in any case the author had failed to provide sufficient information to establish that he was in fact the partner of Mr. C. Therefore, and notwithstanding the author's inability to meet the eligibility criteria set out in the VEA, the State party submits that the decision-making bodies could not have been satisfied that the threshold requirement of establishing the existence of a de facto relationship had been met.

4.10 The State party submits that the author provided insufficient evidence in support of his claim that he was the de facto partner of Mr. C. Thus, on a proper application of the facts, as presented by the author to the relevant law, the State party submits that no distinction was made that was not based on or justified by reasonable and objective criteria. The State party underlines the importance of disbursing Government funds where they are most needed. Thus, it is common practice to impose eligibility criteria in relation to social security payments and the State party notes the Committee's recognition of the rights of States to subject the payment of social security benefits to eligibility criteria.[11]

4.11 The State party explains that the criterion of properly evidencing the existence of a de facto relationship is one of the criteria that must be met before a person is entitled to a dependant's pension under the VEA. According to the State party, Mr. C did not indicate in correspondence with the Department that he was anything other than single.[12] The Department requires evidence of relationships to determine the entitlement to pension benefits. In this regard, the application form for a war widower's pension states:

> "Please attach a copy of your marriage certificate or evidence of your relationship with the deceased veteran, unless you have previously supplied this material to the Department."

4.12 The State party submits that, other than the author's application for a pension, the only evidence provided by the author is his name as Mr. C's partner on the latter's death certificate. It submits that information on New South Wales death certificates, including that relating to spouses, is not considered to be probative of the accuracy of the information. It is submitted that, in isolation, the information on the death certificate is insufficient to establish that the author was the partner of Mr. C for the purposes of the VEA. It further submits that the Department would note evidence of, for example, shared expenses, cohabitation or sharing of significant experiences, correspondence, benefaction under a will and statements from family or mutual friends or acquaintances.

4.13 The assessment of whether the author was in fact Mr. C's partner was no different from the assessment that would have applied to any heterosexual or homosexual person claiming to be the partner of a veteran. In the absence of additional evidence, the Department could not have been satisfied that the author was the partner of Mr. C. The State party submits that this application of the assessment process prevents an issue of equal protection of the law from arising. It also submits that there is no evidence of arbitrary actions on the part of officials in the Department that would support a finding that the author's guarantee of equality before the law has been breached (paragraph 4.1 above).

4.14 In conclusion, the State party submits that, the author failed to provide sufficient evidence of his status as a de facto partner of Mr. C and, this would have provided additional grounds for refusing to grant the author the pension. This refusal, according to the State party does not give rise to a breach of the author's rights under article 26.

Comments by the author

5.1 By submission of 17 August 2001, the author reiterates that he is a victim for the purposes of article 1 of the Optional Protocol in that he is a natural person who was personally affected by the fact that he was denied a pension by reason of his sexual orientation. He reiterates that both the Repatriation Commission and the VRB made it clear that the reason for rejection of his application was because his partner was not a member of the opposite sex, i.e. because of his sexual orientation.

5.2 The author notes that, although the State party submits that it does not affirm the reasons of the Repatriation Commission and the VRB for rejecting his application, it does not deny that sexuality is a criteria relevant to the granting of pensions under the VEA and that the author's sexuality prevents him from satisfying that criteria. He further argues that the State party does not contend that any other domestic bodies reviewing his application would make a different finding on his eligibility for a pension as a dependant.

5.3 With respect to the State party's argument that the author is not a victim because he could be denied a pension under the VEA based on a number of other criteria which do not relate to his sexuality, the author submits that his eligibility to meet these other criteria is not relevant to his status as a victim for the following reasons: even if he meets the criteria in subsection 13 he would still not be entitled to a pension because he would not meet the definition of dependant. In the author's view, it is important to distinguish between cases such as *Hoofdman v. The Netherlands*,[13] where it is evident that an individual would not be entitled to some State benefit on grounds other than the discriminatory grounds proscribed by the Covenant, and cases where the entitlement to a benefit is arguable and requires a proper and fair hearing by an appropriate State administration body for the determination of eligibility.

5.4 The author argues that he had no opportunity to demonstrate whether or not he can meet the criteria of these subsections. He acknowledges that he could not meet the criteria in respect of certain subsections of section 13, which would entitle him to a pension, but he maintains that he has not yet been given the opportunity to establish that he meets the criteria under other subsections of section 13 which would also provide such an entitlement. He submits that, although in its submission the State party made assumptions about his ability to meet these various criteria, the State party has vested domestic bodies, including the VRB, with jurisdiction to determine whether the criteria in question have been met.

5.5 The author contends that, in making assumptions at this stage about his ability to meet these criteria, the State party again discriminates against him because citizens in heterosexual relationships seeking such a pension under the above-mentioned subsections would be able to meet criteria assessed by the Repatriation Commission, the VRB or other decision-making bodies. Such bodies review all the evidence regarding the matter. The author submits that the State party is yet to see the author's evidence or hear his arguments as to how he might meet these criteria. In addition, the author states that to require him to seek further review when it is clear it will not ultimately result in a different outcome is also discriminatory. He argues that he is being treated unequally under the law simply by being excluded on the basis of his sexuality even if he cannot establish that he meets the other criteria for a pension.

5.6 On the issue of exhaustion of domestic remedies, the author states that as the VRB clearly stated that it had no discretion to make a finding other than one which excludes the author from eligibility for a pension on the basis of his failure to meet with the definition of a dependant, it would not be open to the AAT or the Federal Court of Australia to make a different finding. According to the author, under Australian law when the meaning of a provision of a statute is clearly stated in that statute the decision-making body has no power to interpret it differently. Section 5 (E) is very clear in requiring a person claiming to be a member of a couple, in order to be a partner and therefore a dependant under the Act, to be in a heterosexual relationship.

5.7 According to the author, this provision leaves no room for any decision-making bodies to exercise their discretion to include same-sex partners within the definition even if the body thought it just and reasonable to do so. He argues that jurisprudence in relation to the interpretation of terms such as "partner", "spouse" and "couple" has failed to include same-sex relationships even when there has been discretion to do so because the term has never been defined further. The author notes that the State party does not contend that the AAT or the Federal Court could have come to any different interpretation on this point. At best, he notes its claim that the AAT might have found other grounds in addition to the "discriminatory ground" to exclude the author from receiving a pension.

5.8 The author argues that the Committee's jurisprudence[14] only requires him to establish that seeking further review of the reasons articulated for denying a benefit would be futile. It does not require him to seek further domestic remedies on the basis that other decision-making bodies might find him ineligible on grounds which were not of concern to the decision-making bodies which had actually assessed his application. He further submits that no responsibility should be placed on him to seek a review of a decision in order to exhaust domestic remedies, other than in relation to that aspect of the decision which he claims violates the Covenant.

5.9 The author reiterates that he did attempt to have HREOC examine his claim that the limitation of pension payments under the Act to heterosexual partners of veterans was a breach of article 26 of the Covenant. He submits that, in its response, HROEC stated that the resources of the Commission do not permit it to conduct an examination of entitlements for same-sex couples under the provisions of the VEA and that it was unable to investigate the matter on any other basis as it was not a matter where the decision maker had any discretion in determining whether or not the author fell within the provisions of a dependant as defined by the VEA.

5.10 The author refutes the State party's contention that it was likely that had he appealed his case to the AAT it would have refused his application on grounds other than his sexuality. He contends that the State party is incorrect in its argument that he would not have been entitled to a pension under section 13 of the VEA, and argues that neither of the review bodies which were empowered to consider his application indicated that they had any concern with his ability to meet the criteria in the subsections of section 13. He states that Mr. C was not a smoker until he entered the army and that the effects of smoking contributed to his death. Under Australian jurisprudence, veterans who died from a smoking related illness have been found to have died from a war-caused injury, and satisfied section 13, if the reason for smoking was related to enlistment in the army. According to the author, applications for pensions under the VEA based on a war-caused injury by dependants of veterans have been accepted even when the connection between the veteran's death and his war-caused injury was made only posthumously.

5.11 Finally, on the issue of exhaustion of domestic remedies, the author submits that he is of limited means, having no assets and receiving only a Department of Social Security pension, and is not in a financial position to pursue legal options.

5.12 On the merits, the author provides further argument on the issue of the evidence provided pertaining to his relationship with Mr. C. He submits that the suggestion that he was denied a pension because of his failure to provide sufficient evidence of his relationship with Mr. C is inconsistent with the written decisions of the Repatriation Commission and the VRB, which accepted the existence of his relationship with Mr. C. He submits that he could satisfy other review bodies of their relationship,[15] and argues that both decisions indicate that they denied the author's application because he could not meet the definition of dependant, that is, due to his sexual orientation. The VRB expressly accepted the existence of the author's relationship with Mr. C.[16]

5.13 The author argues that given the Australian, and particularly the Department of Defence and Veteran Affairs', attitudes to same-sex relationships, as demonstrated by the Department's refusal to recognize the validity of such relationships,[17] it is not surprising that Mr. C responded the way he did on the documents referred to by the State party at paragraph 4.11. Nothing in these documents denies his relationship with Mr. C or amounts to evidence that there was no such relationship. There is no provision in any of the documents referred to which would have allowed Mr. C to describe his relationship with the author as there is no reference to "partner".

Supplementary submissions by the parties

6.1 On 7 February 2002, the State party informed the Committee that the mere fact that it does not respond to all of counsel's assertions and allegations does not mean that it accepts them as true and correct. It denies the author's allegation that by making assumptions about his ability to meet other criteria of the VEA, the Australian Government is again discriminating against him. It explains that it applied the author's factual circumstances to an examination of the eligibility of either a heterosexual or homosexual applicant for a pension under the VEA not in order to discriminate against the author but rather to answer the allegations made by him to the fullest extent possible. In its view, an examination of the criteria was necessary to answer the allegations and would have been undertaken regardless of the author's sex or sexual orientation.

6.2 On the author's argument that the requirement to seek further review when it is clear it will not result in a different outcome is ultimately also discriminatory, the State party submits that merely informing the Committee of the options that were available to the author is in no way discriminatory. The State party refutes the allegation that decisions of the domestic organs were in and of themselves discriminatory and argues that the author's application was given the same consideration as that of other applicants.

6.3 With respect to the author's claim that he was not given the opportunity to demonstrate whether or not he meets the criteria of section 13 of the VEA, the State party reiterates that the author was free to appeal the decision of the VRB to the AAT. In performing its functions, the AAT conducts a full review of the contested decision, and the author would have been entitled to demonstrate whether or not he met the section 13 criteria.[18]

6.4 The State party submits that while not coming to any conclusions as to the veracity of the additional evidence adduced by the author on this relationship with Mr. C, such evidence should have been presented to the AAT. The State party recalls that it is not the function of the Committee to act as a court or tribunal evaluating evidence.

7.1 On 2 April 2002, the author provided further comments on the State party's response. The author largely reiterates the arguments made in previous submissions. On his argument that he was discriminated against as he was not afforded the opportunity to have his ability to meet the criteria in section 13 assessed by the Repatriation Commission or the VRB, he argues that it was because his case was disposed of on the basis of his sexuality that his ability to meet the other criteria of the VEA was not assessed by a review body. A heterosexual applicant would have had the other criteria assessed by a review body thus removing the opportunity for the State party to undertake this assessment at this stage i.e. in its submission to the Committee.

7.2 In addition, the author states that he did not deny that he had a right to review in theory but argues that to require a person to pursue futile claims through a complex, time consuming and costly legal process which will ultimately result in the original decision being confirmed is discriminatory. The author maintains that the decisions of the Repatriation Commission and the VRB are discriminatory.

7.3 With respect to the information provided by him on the Australian Defence Force policies, the author maintains that this information demonstrates the attitude of the Defence Forces towards same-sex relationships generally. He also directs the Committee to the Defence Force web site to support and substantiate his arguments on the Defence Forces attitude to same-sex relationships. According to the author, it is clear from this web site that a range of benefits are available to the families of Defence Force Personnel but only to "married" and "de facto" families of Defence Force personnel. The author submits that this excludes same-sex partners.

8.1 On 16 May 2002, the State party reiterated that although it did not intend to comment further on the author's arguments, it did not necessarily accept the author's comments or allegations as true or correct.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

9.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol.

9.3 The Committee notes the State party's challenge to the admissibility of the communication on the ground that the author is not a victim as, regardless of the decisions of the domestic authorities, he has not established that he had a prima facie entitlement to a pension and therefore his sexual orientation is not determinative of the issue. The Committee recalls that an author of a communication is a victim within the meaning of article 1 of the Optional Protocol, if he/she is personally adversely affected by an act or omission of the State party. The Committee observes that the domestic authorities refused the author a pension on the basis that he did not meet the definition of being a "member of a couple" by not having lived with a "person of the opposite sex". In the Committee's view it is clear that at least those domestic bodies seized of the case, found the author's sexual orientation to be determinative of lack of entitlement. In that respect, the author has established that he is a victim of an alleged violation of the Covenant for purposes of the Optional Protocol.

9.4 The Committee notes the State party's argument that the author has not exhausted domestic remedies as he did not appeal his case to the AAT, which would likely have concluded that the author was not entitled to a pension on grounds other than (or in addition to) those relating to his sexual orientation and which would not involve any distinction upon which a breach of article 26 could be founded. The Committee notes that the State party does not claim that the AAT would (or even could) have arrived at a different outcome to that of the VRB but may merely have applied different reasoning to dispose of his claim. Moreover, the State party does not argue that the AAT could have come to a different interpretation of the impugned sections of the VEA (sections 5 (E), 5 (E) 2 and 11), on the basis of which the author's application was denied. Neither does it indicate any other domestic body (at either Federal or State level) to which he would have had recourse to challenge the legislation itself. The Committee also notes that it is clear from the legislation that the author would never have been in a position to draw a pension, regardless of whether he could meet all the other criteria under the VEA, as he was not living with a member of the opposite sex. The Committee recalls that domestic remedies need not be exhausted if they objectively have no prospect of success: where under applicable domestic laws the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals would preclude a positive result.[19] Taking into account the clear wording of the sections of the VEA in question, and noting that the State party itself admits that an appeal to the AAT would not have been successful, the Committee concludes that there were no effective remedies that the author might have pursued. As the Committee can find no other reason to consider the communication inadmissible it proceeds to a consideration of the merits.

Consideration of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The author's claim is that the State party's refusal to grant him a pension on the ground that he does not meet with the definition of "dependant", for having been in a same-sex relationship with Mr. C, violates his rights under article 26 of the Covenant, on the basis of his sexual orientation. The Committee notes the State party's argument that had the domestic authorities applied all the facts of the author's case to the VEA it would have found other reasons to dispose of the author's claim, reasons that apply to every applicant regardless of sexual orientation. The Committee also notes that the author contests this view that he did not have a prima facie right to a pension. On the arguments provided, the Committee observes that it is not clear whether the author would in fact have fulfilled the other criteria under the VEA, and it recalls that it is not for the Committee to examine the facts and evidence in this regard. However, the Committee notes that the only reason provided by the domestic authorities in disposing of the author's case was based on the finding that the author did not satisfy the condition of "living with a person of the opposite sex". For the purposes of deciding on the author's claim, this is the only aspect of the VEA at issue before the Committee.

10.3 The Committee notes that the State party fails specifically to refer to the impugned sections of the Act (sections 5 (E), 5 (E) 2 and 11) on the basis of which the author was refused a pension because he did not meet with the definition of a "member of a couple" by not "living with a member of the opposite sex". The Committee observes that the State party does not deny that the refusal of a pension on this basis is a correct interpretation of the VEA but merely refers to other grounds in the Act on which the author's application could have been rejected. The Committee considers, that a plain reading of the definition "member of a couple" under the Act suggests that the author would never have been in a position to draw a pension, regardless of whether he could meet all the other criteria under the VEA, as he was not living with a member of the opposite sex. The State party does not contest this. Consequently, it remains for the Committee to decide whether, by denying a pension under the VEA to the author, on the ground that he was of the same-sex as the deceased Mr. C, the State party has violated article 26 of the Covenant.

10.4 The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation.[20] It recalls that in previous communications the Committee found that differences in the receipt of benefits between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry with all the entailing consequences.[21] It transpires from the contested sections of the VEA that individuals who are part of a married couple or of a heterosexual cohabiting couple (who can prove that they are in a "marriage-like" relationship) fulfil the definition of "member of a couple" and therefore of a "dependant", for the purpose of receiving pension benefits. In the instant case, it is clear that the author, as a same-sex partner, did not have the possibility of entering into marriage. Neither was he recognized as a cohabiting partner of Mr. C, for the purpose of receiving pension benefits, because of his sex or sexual orientation. The Committee recalls its constant jurisprudence that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Australia of article 26 of the Covenant.

12. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee concludes that the author, as a victim of a violation of article 26 is entitled to an effective remedy, including the reconsideration of his pension application without discrimination based on his sex or sexual orientation, if necessary through an amendment of the law. The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The Committee is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The author does not make any specific claim on this fact.

[2] Case No. 172/1984, Views adopted on 9 April 1987.

[3] Case No. 182/1984, Views adopted on 9 April 1987.

[4] Case No. 180/1984, Views adopted on 9 April 1987.

[5] Case No. 488/1992, Views adopted on 31 March 1994.

[6] The State party refers to the *travaux préparatoires* of the Covenant and its Views in the communications of *Broeks v. The Netherlands*, *Danning v. The Netherlands*, *Zwaan de Vries v. The Netherlands*, supra.

[7] The State party refers to UN Doc. A/42/40, page 139, paragraphs 12.1 to 1.13 and the communications *Broeks v. The Netherlands*, *Danning v. The Netherlands* and *Zwaan de Vries v. The Netherlands*, supra.

[8] The State party refers to the following communications in an attempt to show that the author has not sufficiently demonstrated that he is a victim: *J.H v. Canada*, Case No. 187/1985, Decision adopted on 12 April 1985; *Tadman et al v. Canada*, Case No. 816/1998, Decision adopted on 29 October 1999; *de Groot v. The Netherlands*, Case No. 578/1994, Decision adopted on 14 July 1995; *Toonen v. Australia*, supra.

[9] The State party refers to the following reports of the Human Rights Committee in UN Docs. A/48/40, paragraph 781; A/47/40, paragraph 625; A/46/40, paragraph 679; A/45/40, paragraph 608; A/44/40, paragraph 633; A/43/40, paragraph 654; A/39/40, paragraph 588; A/52/40, paragraph 478; A/51/40, paragraph 388; A/50/40, paragraph 500; *Oló Bahamonde v. Equatorial Guinea*, Case No. 468/1991, Views adopted on 20 October 1993; *J. A. M. B.-R. v. The Netherlands*, Case No. 477/1991, Decision adopted on 7 April 1994.

[10] The State party refers to the following communications: *Kelly v. Jamaica*, Case No. 537/1993, Views adopted on 17 July 1996; *Henry et al. v. Jamaica*, Case No. 571/1994, Views adopted on 25 July 1996; *Pereira, on behalf of Colamarco Patino v. Panama*, Case No. 437/1990, Decision adopted on 21 October 1994; *G v. Canada*, Case No. 934/2000, Decision adopted on 17 July 2000; *A v. New Zealand*, Case No. 754/1997, Views adopted on 15 July 1999; *Mansur et al. v. The Netherlands*, Case No. 883/1999, Decision of 5 November 1999; *Maille v. France*, Case No. 689/2000, Views adopted on 10 July 2000; and *Gómez Vázquez v. Spain*, Case No. 701/1996, Views adopted on 20 July 2000.

[11] The State party refers to *Neefs v. The Netherlands*, Case No. 425/1990, Views adopted on 15 July 1994, as an example.

[12] The State party provides and refers to the following documents submitted by Mr. C to support this view (a) Claim for Service Pension by a Veteran or Mariner, pages 2, 3, 5 and 6; (b) Lifestyle Report, particularly Section 2 "Personal Relationships", in which there is no reference to a partner, and Section 4 "Recreation and Community Activities", in which Mr. C says that he rarely receives visitors either by friends or family; (c) Medical Examination - Psychiatric, in which there is no reference to a partner.

[13] *Communication No. 602/1994, Views adopted on 3 November 1998*. In this case, the Committee held, on the merits, that "on the basis of the information before it, it appears that the author, even if he had been married to his partner rather than cohabitating with her without marriage, would not have been entitled to a pension under the AWW, since he was under 40 years of age, not unfit for work and had no unmarried children to care for. The matter before the Committee is thus confined to the entitlement to a temporary benefit only".

[14] The author refers to: *Barzhig v. France* ,supra; *Collins v. Jamaica*, Case No. 356/1989, Views adopted on 12 May 1993; *Maille v. France*, supra; and *Gómez Vázquez v. Spain*, supra.

[15] The author provides a statement regarding his relationship with Mr. C and eight statements from others attesting to the existence of a genuine and longstanding relationship between them. In the author's further submission, of 2 April 2002, he submits that he does not request the Committee to make determinations of fact on this evidence but provides it only to refute the material provided by the State party.

[16] The author provides the decision which states that: "The Board … was sympathetic to his position of having had a long-term relationship with the late veteran." It then sets out the relevant provisions of the VEA relating to the definition of a dependant and states "under the current legislation the Board is required to affirm the decision under review in relation to the status of the applicant".

[17] The author provides his own summary of some Defence Department policies on recognition of same-sex relationships.

[18] The State party provides copies of sections 25 and 43 of the Administrative Appeals Tribunal Act 1975, which describes the functions of the AAT.

[19] *Barzhig v. France*, supra.

[20] *Toonen v. Australia*, supra.

[21] *Danning v. The Netherlands*, supra.

APPENDIX

Individual opinion by Committee members Ms. Ruth Wedgwood and Mr. Franco Depasquale (concurring)

Many countries recognize a right of privacy in intimate relationships, enjoyed by all citizens regardless of sexual orientation. In 1994, this Committee grounded a similar right on article 17 of the Covenant on Civil and Political Rights - finding, in its Views on *Toonen v. Australia*,[1] that Tasmanian penal statutes purporting to criminalize "unnatural sexual practices" amounted to an "arbitrary or unlawful interference with ... privacy". In Toonen, the federal Government of Australia represented to the Committee that the Tasmanian criminal law indeed amounted to "arbitrary interference with [Mr. Toonen's] privacy" and "cannot be justified" on policy grounds.[2] Laws penalizing homosexual activity had already been repealed in other Australian states, with the exception of Tasmania, and this Committee's decision seems to have served as a means for Australia to overcome barriers of federalism.

In Toonen, the author had complained that the Tasmanian criminal code did "not distinguish between sexual activity *in private* and sexual activity *in public* and bring[s] private activity *into the public domain*".[3] (Emphasis added.) The Committee's ruling was founded on the right to be left alone, where there are no reasonable safety, public order, health or moral grounds offered by the State party to justify the interference with privacy.

The current case of *Edward Young v. Australia* poses a broader question, where various States parties may have decided views - namely, whether a State is obliged by the Covenant on Civil and Political Rights to treat long-term same-sex relationships identically to formal marriages and "marriage-like" heterosexual unions - here, for the purpose of awarding pension benefits to the surviving dependents of military service personnel. Writ large, the case opens the general question of positive rights to equal treatment - whether a State must accommodate same-sex relationships on a par with more traditional forms of civil union.

On the facts and in the particular posture of this case, the Committee has concluded that the differentiation made by Australia between same-sex and heterosexual civil partners has not been sustained against Mr. Young's challenge. The trespass is not based on a right of privacy under article 17, but rather on the claimed right to equality before the law under article 26 of the Covenant.

But two observations must be made about the limits of the Committee's disposition of this case, pertinent to future practice.

First, as a general matter, complainants should be held to their duty of exhausting local remedies, including full rights of local appeal, before any communication is judged on the merits by this Committee. We have no basis to assume that Australian courts would be unable or unwilling to interpret Australian statutory law in light of the treaty norms voluntarily adopted by Australia. Even if a legal system has not formally incorporated the Covenant within its domestic law, the Covenant may serve as a persuasive benchmark in making judgements about parliamentary intent. The Committee should not assume that international law only operates from the outside on national legal systems. Nor can the Committee demand that rights must be incorporated by open citation of the Covenant. It is the substance, rather than the nomenclature that counts, and some national court systems may prefer to explain their choices in light of constitutional, common law, or civil law norms, even while protecting the substance of Covenant rights. Certainly if the volume of individual communications under the Optional Protocol of the Covenant continues to increase, the Committee will have to exercise greater discipline in consigning to the national courts the decisions that are properly theirs.

In this case, Mr. Young applied for a pension as a veteran's dependent, claiming status as the survivor of Mr. C. The Australian Repatriation Commission found that Mr. Young did not qualify as a statutory dependent under Australian law, despite a long domestic relationship described by Mr. Young.[4] On first appeal, the Australian Veterans Review Board affirmed the denial of benefits to Mr. Young. But the complainant did not take further available appeals to the Commonwealth Administrative Appeals Tribunal or to the Federal Court of Australia, and there is nothing in our record to show that these steps would have been futile.

Second, the posture of the instant case limits the reach of our decision. Australia has contested the admissibility of the communication only on the fact-specific claims (1) that Mr. C has not been shown to have suffered a "war-caused" death and hence would not be able to pass on pension rights to any dependent at all, and (2) that there is insufficient evidence of a durable relationship between Mr. Young and Mr. C.

In a case of this moment, it is perhaps surprising that Australia has not chosen to enter into any discussion, pro or con, on the merits of the claim made under article 26 of the Covenant. Australia has offered no views concerning Mr. Young's argument that the distinction made by statute between same sex and heterosexual civil partners is unfounded, and the Committee has essentially entered a default judgement. Under Covenant jurisprudence, a State party must offer "reasonable and objective criteria" for making any distinction on grounds of sex or (according to our "guidance" to the State party in paragraph 8.7 of the Toonen case) on grounds of sexual orientation. Yet, as the Committee notes in paragraph 10.4 of the instant case of Mr. Young, "The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced". In every real sense, this is not a contested case.

Many Governments and many people of good will share an interest in finding an appropriate moral and legal answer to the issues and controversies of equalizing various government entitlements between same-sex and heterosexual couples, including the disputed claim that there is a trans-jurisdictional right to recognition of gay marriage. There is an equally engaged debate within many democracies on whether military service should continue to be limited to heterosexual persons.

In the instant case, the Committee has not purported to canvas the full array of "reasonable and objective" arguments that other States and other complainants may offer in the future on these questions in the same or other contexts as those of Mr. Young. In considering individual communications under the Optional Protocol, the Committee must continue to be mindful of the scope of what it has, and has not, decided in each case.

(*Signed*): Ruth Wedgwood

(*Signed*): Franco Depasquale

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] *Toonen v. Australia*, Communication No. 488/1992, Views adopted on 4 April 1994.

[2] Id., para. 6.2.

[3] Id., para. 3.1 (a).

[4] Mr. Young stated that he was the companion of Mr. C for 38 years, beginning in 1960. Mr. C served in the Australian armed forces for a period of three years, during World War II. The commission hearing officer expressed "regret that I am … unable to exercise any discretion in this matter". Id., para. 2.2.

V. Communication No. 950/2000, *Sarma v. Sri Lanka** (Views adopted on 16 July 2003, seventy-eighth session)

Submitted by:	Mr. S. Jegatheeswara Sarma
Alleged victim:	The author, his family and his son, Mr. J. Thevaraja Sarma
State party:	Sri Lanka
Date of communication:	25 October 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 July 2003,

Having concluded its consideration of communication No. 950/2000, submitted to the Human Rights Committee by Mr. S. Jegatheeswara Sarma under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 25 October 1999, is Mr. S. Jegatheeswara Sarma, a Sri Lankan citizen who claims that his son is a victim of a violation by the State party of articles 6, 7, 9 and 10 of the International Covenant on Civil and Political Rights (the Covenant) and that he and his family are victims of a violation by the State party of article 7 of the Covenant. He is not represented by counsel.

1.2 The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 11 June 1980 and 3 October 1997. Sri Lanka also made a declaration according to which "[t]he Government of the Democratic Socialist Republic of Sri Lanka pursuant to article (1) of the Optional Protocol recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Democratic Socialist Republic of Sri Lanka, who claim to be victims of a violation of any of the rights set forth in the Covenant which results either from acts, omissions, developments or events occurring after the date on which the Protocol entered into force for the Democratic Socialist Republic of Sri Lanka, or from a decision relating to acts, omissions, developments or events after that date. The Democratic Socialist Republic of Sri Lanka also proceeds on the understanding that the Committee shall not consider any communication from individuals unless it has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement".

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

1.3 On 23 March 2001, the Committee, acting through its Special Rapporteur for new communications, decided to separate the examination of the admissibility from the merits of the case.

The facts as submitted by the author

2.1 The author alleges that, on 23 June 1990, at about 8.30 a.m., during a military operation, his son, himself and three others were removed by army members from their family residence in Anpuvalipuram, in the presence of the author's wife and others. The group was then handed over to other members of the military, including one Corporal Sarath, at another location (Ananda Stores Compound Army Camp). The author's son was apparently suspected of being a member of the LTTE (Liberation Tigers of Tamil Eelam) and was beaten and tortured. He was thereafter taken into military custody at Kalaimagal School allegedly after transiting through a number of other locations. There, he was allegedly tortured, hooded and forced to identify other suspects.

2.2 In the meantime, the author and other persons arrested were also transferred to Kalaimagal School, where they were forced to parade before the author's hooded son. Later that day, at about 12.45 p.m., the author's son was taken to Plaintain Point Army Camp, while the author and others were released. The author informed the Police, the International Committee of the Red Cross (ICRC) and human rights groups of what had happened.

2.3 Arrangements were later made for relatives of missing persons to meet, by groups of 50, with Brigadier Pieris, to learn about the situation of the missing ones. During one of these meetings, in May 1991, the author's wife was told that her son was dead.

2.4 The author however claims that, on 9 October 1991 between 1.30 and 2 p.m., while he was working at "City Medicals Pharmacy", a yellow military van with license plate No. 35 Sri 1919 stopped in front of the pharmacy. An army officer entered and asked to make some photocopies. At this moment, the author saw his son in the van looking at him. As the author tried to talk to him, his son signalled with his head to prevent his father from approaching.

2.5 As the same army officer returned several times to the pharmacy, the author identified him as star class officer Amarasekara. In January 1993, as the "Presidential Mobile Service" was held in Trincomalee, the author met the then Prime Minister, Mr. D.B. Wijetunghe and complained about the disappearance of his son. The Prime Minister ordered the release of the author's son, wherever he was found. In March 1993, the military advised that the author's son had never been taken into custody.

2.6 In July 1995, the author gave evidence before the "Presidential Commission of Inquiry into Involuntary Removals and Disappearances in the Northern and Eastern Provinces" (The Presidential Commission of Inquiry), without any result. In July 1998, the author again wrote to the President, and was advised in February 1999 by the Army that no such person had been taken into military custody. On 30 March 1999, the author petitioned to the President, seeking a full inquiry and the release of his son.

The complaint

3. The author contends that the above facts constitute violations by the State party of articles 6, 7, 9, and 10 of the Covenant.

The State party's observations on the admissibility of the communication

4.1 By submission of 26 February 2001, the State party argues that the Optional Protocol does not apply *ratione temporis* to the present case. It considers that the alleged incident involving the involuntary removal of the author's son took place on 23 June 1990 and his subsequent disappearance in May 1991, and these events occurred before the entry into force of the Optional Protocol for Sri Lanka.

4.2 The State party argues that the author has not demonstrated that he has exhausted domestic remedies. It is submitted that the author has failed to resort to the following remedies:

- A writ of habeas corpus to the Court of Appeal, which gives the possibility for the Court to force the detaining authority to present the alleged victim before it;
- In cases where the Police refuse or fail to conduct an investigation, article 140 of the State party's Constitution provides for the possibility of applying to the Court of Appeal to obtain a writ of mandamus in cases where a public authority fails or refuses to respect a statutory duty;
- In the absence of an investigation led by the police or if the complainant does not wish to rely on the findings of the police, such complainant is entitled directly to institute criminal proceedings in the Magistrate's Court, pursuant to section 136 (1) (a) of the Code of Criminal Procedure.

4.3 The State party argues that the author has failed to demonstrate that these remedies are or would be ineffective, or would extend over an unreasonable period of time.

4.4 The State party therefore considers that the communication is inadmissible.

Comments by the author

5.1 On 25 May 2001, the author responded to the State party's observations.

5.2 With regard to the competence of the Committee *ratione temporis*, the author considers that he and his family are suffering from a continuing violation of article 7 as, at least to the present date. He has had no information about his son's whereabouts. The author refers to the jurisprudence of the Committee in *Quinteros v. Uruguay*[1] and *El Megreisi v. Libyan Arab Jamahiriya*[2] and maintains that this psychological torture is aggravated by the contradictory replies received from the authorities.

5.3 To demonstrate his continued efforts, the author lists the 39 letters and other requests filed in respect of the disappearance of his son. These requests were sent to numerous Sri Lankan authorities, including the police, the army, the national human rights commission, several ministries, the president of Sri Lanka and the Presidential Commission of Inquiry. Despite all these steps, the author has not been given any further information as to the whereabouts of his son. Moreover, following the submission of the present communication to the Committee, the Criminal Investigations Department was ordered to record the statements, in Sinhala, of the author and nine other witnesses whom the author had cited in previous complaints, without any tangible outcome to date.

5.4 The author emphasizes that such inaction is unjustifiable in a situation where he had provided the authorities with the names of the persons responsible for the disappearance, as well as the names of other witnesses. He submitted the following details to the State party's authorities:

> "1. On 23.06.1990 my son was removed by Army soldier Corporal Sarath in my presence at Anpuvalipuram. He hails from Girithala, Polanaruwa. He is married to a midwife at 93rd Mile Post, Kantale. She is working at Kantala Hospital.
>
> 2. On 09.10.1991 Mr. Amerasekera (Star Badge) from the army brought my son to City Medicals Pharmacy by van No. 35 Sri 1919.
>
> 3. On 23.06.1990 Army personnel who were on duty during the round-up at Anpuvalipuram:
>
> (a) Major Patrick;
>
> (b) Suresh Cassim [lieutenant];
>
> (c) Jayasekara [...];
>
> (d) Ramesh (Abeypura).
>
> 4. During this period officers were on duty at Plantain Point Army Camp. In addition to names mentioned in paragraph 3:
>
> (a) Sunil Tennakoon (at present gone on transfer from here);
>
> (b) Tikiri Banda (presently working here);
>
> (c) Captain Gunawardena;
>
> (d) Kundas (European).

5. Witnesses:

(a) My wife;

(b) Mr. S. Alagiah, 330, Anpuvalipuram, Trincomalee;

(c) Mr. P. Markandu, 442, Kanniya Veethi, Barathipuram, Trinco;

(d) Mr. P. Nemithasan, 314, Anpuvalipuram, Trincomalee;

(e) Mr. S. Mathavan (maniam Shop) Anpuvalipuram, Trincomalee;

(f) Janab. A.L. Majeed, City Medical, Dockyard Road, Trincomalee;

(g) Mrs. Malkanthi Yatawara, 80A, Walpolla, Rukkuwila, Nittambuwa;

(h) Mr. P.S. Ramiah, Pillaiyar Kovilady, Selvanayagapuram, Trinco."

5.5 The author also testified before the Presidential Commission of Inquiry on 29 July 1995 and refers to the following statement of the commission:

> Regarding […] the evidence available to establish such alleged removals or disappearances, […] there had been large-scale corroborative evidence by relatives, neighbours and fellow human beings [sic], as most of these arrests were done in full public view, often from Refugee Camps and during cordon and search operations where large numbers of people witnessed the incidents.
>
> Regarding […] the present whereabouts of the persons alleged to have been so removed or to have so disappeared, the Commission faced a blank wall in this investigation. On the one hand the security service personnel denied any involvement in arrests in spite of large-scale corroborative evidence of their culpability. […]

5.6 The author maintains that these facts reveal a violation of articles 6, 7, 9 and 10 of the Covenant.

5.7 The author argues that he has exhausted all effective, available and not unduly prolonged domestic remedies. Referring to reports of international human rights organizations, the author submits that the remedy of habeas corpus is ineffective in Sri Lanka and unnecessarily prolonged. The author also refers to the report of the Working Group on Enforced or Involuntary Disappearances of 28 December 1998, which confirms that even if ordered by courts, investigations are not carried out.

5.8 The author submits that, during the period 1989-1990, in Trincomalee, the law was non-existent, the courts were not functioning, people were shot at sight and many were arrested. Police stations in the "Northern and Eastern Province" were headed by Singhalese who arrested and caused the disappearance of hundreds of Tamils. As a result, the author could not report to the police about the disappearance of his son, for fear of reprisals or for being suspected of terrorist activities.

Decision on admissibility

6.1 At its seventy-fourth session, the Committee considered the admissibility of the communication. Having ascertained that the same matter was not being examined and had not been examined under another procedure of international investigation or settlement, the Committee examined the facts that were submitted to it and considered that the communication raised issues under article 7 of the Covenant with regard to the author and his family and under articles 6, paragraph 1, 7, 9, paragraph 1 and 10 of the Covenant with regard to the author's son.

6.2 With respect to the application *ratione temporis* of the Optional Protocol to the State party, the Committee noted that, upon acceding to the Optional Protocol, Sri Lanka had entered a declaration restricting the Committee's competence to events following the entry into force of the Optional Protocol. However, the Committee considered that although the alleged removal and subsequent disappearance of the author's son had taken place before the entry into force of the Optional Protocol for the State party, the alleged violations of the Covenant, if confirmed on the merits, may have occurred or continued after the entry into force of the Optional Protocol.

6.3 The Committee also examined the question of exhaustion of domestic remedies and considered that in the circumstances of the case, the author had used the remedies that were reasonably available and effective in Sri Lanka. The Committee noted that, in 1995, the author had instituted a procedure with an ad hoc body (the Presidential Commission of Inquiry into Involuntary Removals and Disappearances in the Northern and Eastern Provinces) that had been especially created for cases like this one. Bearing in mind that this Commission had not, after seven years, reached a final conclusion about the disappearance of the author's son, the Committee was of the view that this remedy was unreasonably prolonged. Accordingly, it declared the communication admissible on 14 March 2002.

State party's submission on the merits

7.1 On 22 April 2002, the State party commented on the merits of the communication.

7.2 On the facts of the case and the steps that have been taken after the alleged disappearance of the author's son, the State party submits that, on 24 July and 30 October 2000, the Attorney-General of Sri Lanka received two letters from the author seeking "inquiry and release" of his son from the Army. Further to these requests, the Attorney-General's Department inquired with the Sri Lankan Army as to whether the author's son had been arrested and whether he was still being detained. Inquiries revealed that neither the Sri Lanka Navy, nor the Sri Lanka Air Force, nor the Sri Lanka Police had arrested or detained the author's son. The author's requests were transmitted to the Missing Persons Commission (MPC) Unit of the Attorney-General's Department. On 12 December 2000, the coordinator of the MPC informed the author that suitable action would be taken and advised the Inspector General of Police (IGP) to conduct criminal investigation into the alleged disappearance.

7.3 On 24 January 2001, detectives of the Disappearance Investigations Unit (DIU) met with a number of persons, including the author and his wife, interviewed them and recorded their statements. On 25 January 2001, the DIU visited Plaintain Point Army Camp. On the same day and between 8 and 27 February 2001, a number of other witnesses were interviewed by the DIU. Between 3 April and 26 June 2001, the DIU proceeded to the interview of 10 Army personnel, including the Officer commanding the Security Forces of the Trincomalee Division in 1990-1991. The DIU completed its investigation on 26 June 2001 and transmitted its report to the MPC, which, on 22 August 2001, requested further investigation on particular points. The results of this additional investigation were transmitted to the MPC on 24 October 2001.

7.4 The State party submits that the results of the criminal investigation have revealed that, on 23 June 1990, Corporal Ratnamala Mudiyanselage Sarath Jayasinghe Perera (hereafter Corporal Sarath) of the Sri Lankan Army and two other unidentified persons had "involuntarily removed (abducted)" the author's son. This abduction was independent of the "cordon and search operation" carried out by the Sri Lankan Army in the village of Anpuwalipuram in the District of Trincomalee, in order to identify and apprehend terrorist suspects. During this operation, arrests and detention for investigation did indeed take place in accordance with the law but the responsible officers were unaware of Corporal Sarath's conduct and of the author's son's abduction. The investigation failed to prove that the author's son had been detained at Plaintain Point Army Camp or in any other place of detention, and the whereabouts of the author's son could not be ascertained.

7.5 Corporal Sarath denied any involvement in the incident and did not provide information on the author's son, nor any acceptable reasons why witnesses would have falsely implicated him. The MPC thus decided to proceed on the assumption that he and two unidentified persons were responsible for the "involuntary removal" of the author's son.

7.6 With regard to the events of 9 October 1991, when the author allegedly saw his son in the company of Lieutenant Amarasekera, the investigation revealed that, during the relevant period, there was no officer of such name in the District of Trincomalee. The person on duty in the relevant area in 1990-1991 was officer Amarasinghe who died soon thereafter as a result of a terrorist attack.

7.7 On 18 February 2002, the author sent another letter to the Attorney-General stating that his son had been "removed" by Corporal Sarath, requesting that the matter be expedited and that his son be handed over without delay. On 28 February 2002, the Attorney-General informed the author that his son had disappeared after his abduction on 23 June 1990, and that his whereabouts were unknown.

7.8 On 5 March 2002, Corporal Sarath was indicted of having "abducted" the author's son on 23 June 1990 and along with two other unknown perpetrators, an offence punishable under section 365 of the Sri Lankan Penal Code. The indictment was forwarded to the High Court of Trincomalee and the author was so informed on 6 March 2002. The State party submits that Corporal Sarath was indicted for "abduction" because its domestic legislation does not provide for a distinct criminal offence of "involuntary removal". Moreover, the results of the investigation did not justify the assumption that Corporal Sarath was responsible for the murder of the victim, as the latter was seen alive on 9 October 1991. The trial of Corporal Sarath will commence in late 2002.

7.9 The State party submits that it did not, either directly or through the relevant field commanders of its Army, cause the disappearance of the author's son. Until the completion of the investigation referred to above, the conduct of Corporal Sarath was unknown to the State party and constituted illegal and prohibited activity, as shown by his recent indictment. In the circumstances, the State party considers that the "disappearance" or the deprivation of liberty of the author's son cannot be seen as a violation of his human rights.

7.10 The State party reiterates that the alleged "involuntary removal" or the "deprivation of liberty" of the author's son on 23 June 1990 and his subsequent alleged disappearance on or about 9 October 1991 occurred prior to the ratification of the Optional Protocol by Sri Lanka, and that there is no material in the communication that would demonstrate a "continuing violation".

7.11 The State party therefore contends that the communication is without merits and that it should, in any event, be declared inadmissible due to the reasons developed in paragraph 7.10.

Author's comments

8.1 On 2 August 2002, the author commented on the State party's observations on the merits.

8.2 The author submits that the disappearance of his son took place in a context where disappearances were systemic. He refers to the "final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces" of 1997, according to which:

> [Y]outh in the North and East disappeared in droves in the latter part of 1989 and during the latter part of 1990. These large-scale disappearances of youth is connected with the military operations started against the JVP in the latter part of 1989 and against the LTTE during Eleam War II beginning in June 1990 [...]. It was obvious that a section of the Army was carrying out the instructions of its political superiors with a zeal worthy of a better cause. Broad power was given to the Army under the Emergency Regulations which included the power to dispose of the bodies without post-mortem or inquests and this encouraged a section of the Army to cross the invisible line between the legitimate Security Operation and large-scale senseless arrests and killings.

8.3 The author emphasizes that one aspect of disappearances in Sri Lanka is the absolute impunity that officers and other agents of the State enjoy, as illustrated in the Report of the Working Group on Enforced or Involuntary Disappearances after its third visit to Sri Lanka in 1999.[3] The author argues that the disappearance of his son is an act committed by State agents as part of a pattern and policy of enforced disappearances in which all levels of the State apparatus are implicated.

8.4 The author draws attention to the fact that the State party does not contest that the author's son has disappeared, even if it claims not to be responsible; that it confirms that the author's son was abducted on 23 June 1990 by Corporal Sarath and two other unidentified officers, although in a manner which was "distinctly separate and independent" from the cordon and search operation that was carried out by the Army in this location at the same time; and that it submits that officers of the Army had been unaware of Corporal Sarath's conduct and the author's son's abduction.

8.5 The author indicates that enforced disappearances represent a clear breach of various provisions of the Covenant, including its article 7,[4] and, emphasizing that one of the main issues of this case is that of imputability, considers that there is little doubt that his son's disappearance is imputable to the State party because the Sri Lankan Army is indisputably an organ of that State.[5] Where the violation of Covenant rights is carried out by a soldier or other official who uses his or her position of authority to execute a wrongful act, the violation is imputable to the State,[6] even where the soldier or the other official is acting beyond his authority. The author, relying on the judgement of the Inter-American Court of Human Rights in the *Velasquez Rodriguez* case[7] and that of the European Court of Human Rights, concludes that, even where an official is acting ultra vires, the State will find itself in a position of responsibility if it provided the means or facilities to accomplish the act. Even if, and this is not known in this case, the officials acted in direct contravention of the orders given to them, the State may still be responsible.[8]

8.6 The author maintains that his son was arrested and detained by members of the Army, including Corporal Sarath and others unidentified, in the course of a military search operation and that these acts resulted in the disappearance of his son. Pointing to the overwhelming evidence before the Presidential Committee of Inquiry indicating that many of those in Trincomalee who were arrested and taken to Plaintain Point Army Camp were not seen again, the assertion that this disappearance was an isolated act initiated solely by Corporal Sarath, without the knowledge or complicity of other levels within the military chain of command, defies credibility.

8.7 The author contends that the State party is responsible for the acts of Corporal Sarath even if, as it is suggested by the State party, his acts were not part of a broader military operation because it is undisputed that the acts were carried out by Army personnel. Corporal Sarath was in uniform at the relevant time and it is not disputed that he was under the orders of an officer to conduct a search operation in that area during the period in question. The State party thus provided the means and facilities to accomplish the imputed act. That Corporal Sarath was a low-ranking officer acting with a wide margin of autonomy and without orders from superiors does not exempt the State party from its responsibility.

8.8 The author further suggests that even if the acts were not directly attributable to the State party, its responsibility can arise due to its failure to meet the positive obligations to prevent and punish certain serious violations such as arbitrary violations of the right to life. This may arise whether or not the acts are carried out by non-State actors.

8.9 The author argues in this respect that the circumstances of this case must establish, at a minimum, a presumption of responsibility that the State party has not rebutted. In this case, referring to the jurisprudence of the Committee,[9] it is indeed the State party, not the author, that is in a position to access relevant information and therefore the onus must be on the State to refute the presumption of responsibility. The State party has failed to initiate a thorough inquiry into the author's allegations in areas within which it alone has access to the relevant information, and to provide the Committee with relevant information.

8.10 The author argues that according to the jurisprudence of the Committee[10] and that of the Inter-American Court of Human Rights, the State party had a responsibility to investigate the disappearance of the author's son in a thorough and effective manner, to bring to justice those responsible for disappearances, and to provide compensation for the victims' families.[11]

8.11 In the present case, the State party has failed to investigate effectively its responsibility and the individual responsibility of those suspected of the direct commission of the offences and gave no explanation as to why an investigation was commenced some 10 years after the disappearance was first brought to the attention of the relevant authorities. The investigation did not provide information on orders that may have been given to Corporal Sarath and others regarding their role in search operations, nor has it considered the chain of command. It has not provided information about the systems in place within the military concerning orders, training, reporting procedures or any other process to monitor the activity of soldiers which may support or undermine the claim that his superiors did not order and were not aware of the activities of the said Corporal. It did not provide evidence that Corporal Sarath or his colleagues were acting in a personal capacity without the knowledge of other officers.

8.12 There are also striking omissions in the evidence gathered by the State party. The records of the ongoing military operations in this area in 1990 have indeed not been accessed or produced and no detention records or information relating to the cordon and search operation have been adduced. It also does not appear that the State party has made investigations into the vehicle bearing registration number 35 SRI 1919 in which the author's son was last seen. The Attorney-General who filed the indictment against Corporal Sarath has not included key individuals as witnesses for the prosecution, despite the fact that they had already provided statements to the authorities and may provide crucial testimony material to this case. These include Poopalapillai Neminathan, who was arrested along with the author's son and was detained with him at the Plaintain Point Army Camp, Santhiya Croose, who was also arrested along with the author's son but was released en route to the Plaintain Point Army Camp, S.P. Ramiah, who witnessed the arrest of the author's son and Shammugam Algiah from whose house the author's son was arrested. Moreover, there is no indication of any evidence having been gathered as to the role of those in the higher echelons of the Army as such officers may themselves be criminally responsible either directly for what they ordered of instigated or indirectly by dint of their failure to prevent or punish their subordinates.

8.13 On the admissibility of the communication, the author emphasizes that the Committee already declared the case admissible on 14 March 2002 and maintains that the events complained of have continued after the ratification of the Optional Protocol by the State party to the day of his submission. The author also cites article 17 of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance.[12]

8.14 The author asks the Committee to hold the State party responsible for the disappearance of his son and declare that it has violated articles 2, 6, 7, 9, 10 and 17 of the Covenant. He further asks that the State party undertake a thorough and effective investigation, along the lines suggested above; provide him with adequate information resulting from its investigation; release his son; and pay adequate compensation.

Examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

9.2 With regard to the author's claim in respect of the disappearance of his son, the Committee notes that the State party has not denied that the author's son was abducted by an officer of the Sri Lankan Army on 23 June 1990 and has remained unaccounted for since then. The Committee considers that, for purposes of establishing State responsibility, it is irrelevant in the present case that the officer to whom the disappearance is attributed acted ultra vires or that superior officers were unaware of the actions taken by that officer.[13] The Committee therefore concludes that, in the circumstances, the State party is responsible for the disappearance of the author's son.

9.3 The Committee notes the definition of enforced disappearance contained in article 7, paragraph 2 (i) of the Rome Statute of the International Criminal Court:[14] *"Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.* Any act of such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). It also violates or constitutes a grave threat to the right to life (art. 6).[15]

9.4 The facts of the present case clearly illustrate the applicability of article 9 of the Covenant concerning liberty and security of the person. The State party has itself acknowledged that the arrest of the author's son was illegal and a prohibited activity. Not only was there no legal basis for his arrest, there evidently was none for the continuing detention. Such a gross violation of article 9 can never be justified. Clearly, in the present case, in the Committee's opinion, the facts before it reveal a violation of article 9 in its entirety.

9.5 As to the alleged violation of article 7, the Committee recognizes the degree of suffering involved in being held indefinitely without any contact with the outside world,[16] and observes that, in the present case, the author appears to have accidentally seen his son some 15 months after the initial detention. He must, accordingly, be considered a victim of a violation of article 7. Moreover, noting the anguish and stress caused to the author's family by the disappearance of his son and by the continuing uncertainty concerning his fate and whereabouts,[17] the Committee considers that the author and his wife are also victims of violation of article 7 of the Covenant. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant both with regard to the author's son and with regard to the author's family.

9.6 As to the possible violation of article 6 of the Covenant, the Committee notes that the author has not asked the Committee to conclude that his son is dead. Moreover, while invoking article 6, the author also asks for the release of his son, indicating that he has not abandoned hope for his son's reappearance. The Committee considers that, in such circumstances, it is not for it to appear to presume the death of the author's son. Insofar as the State party's obligations under paragraph 11 below would be the same with or without such a finding, the Committee considers it appropriate in the present case not to make any finding in respect of article 6.

9.7 In the light of the above findings, the Committee does not consider it necessary to address the author's claims under articles 10 and 17 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 7 and 9 of the International Covenant on Civil and Political Rights with regard to the author's son and article 7 of the International Covenant on Civil and Political Rights with regard to the author and his wife.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the violations suffered by the author's son, the author and his family. The Committee considers that the State party is also under an obligation to expedite the current criminal proceedings and ensure the prompt trial of all persons responsible for the abduction of the author's son under section 356 of the Sri Lankan Penal Code and to bring to justice any other person who has been implicated in the disappearance. The State party is also under an obligation to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Case No. 107/1981, Views adopted on 21 July 1983.

[2] Case No. 440/1990, Views adopted on 24 March 1994.

[3] E/CN.4/2000/64/Add.1, paras. 4 and 35.

[4] *Celis Laureano v. Peru*, Case No. 540/1993, Views adopted on 25 March 1996.

[5] *Velasquez Rodriguez* case (1989), Inter-American Court of Human Rights, Judgement of 29 July 1998, (Ser. C) No. 4 (1988).

[6] See *Caballero Delgado and Santana* case, Inter-American Court of Human Rights, Judgement of 8 December 1995 (Annual Report of the Inter-American Court of Human Rights 1995 OAS/Ser. L/V III.33 Doc. 4); *Garrido and Baigorria* case, Judgement on the merits, 2 February 1996, Inter-American Court of Human Rights.

[7] *Velasquez Rodriguez* case (1989), Judgement of 29 July 1998, Inter-American Court of Human Rights, (Ser. C) No. 4 (1988), paras. 169-170.

[8] *Timurtas v. Turkey*, European Court of Human Rights, Application No. 23531/94, Judgement of 13 June 2000; *Ertak v. Turkey*, European Court of Human Rights, Application No. 20764/92, Judgement of 9 May 2000.

[9] See *Bleier v. Uruguay*, Case No. 30/1978, adopted on 24 March 1980, paragraph 13.3 ("With regard to the burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities [...]").

[10] *Sanjuan Arevalo v. Colombia*, Case No. 181/1984, Views adopted on 3 November 1989; *Avellanal v. Peru*, Case No. 202/1986, Views adopted on 28 October 1988; *Mabaka Nsusu v. Congo*, Case No. 157/1983, Views adopted on 26 March 1986; and *Vicente et al. v. Colombia*, Case No. 612/1995, Views adopted on 29 July 1997; see also general comment No. 6, HRI/GEN/1/Rev.1 (1994), para. 6.

[11] Concluding observations of the Human Rights Committee on the third periodic report of Senegal, 28 December 1992, CCPR/C/79/Add.10; see also *Baboeram v. Surinam*, Case No. 146/1983, Views adopted on 4 April 1985 and *Hugo Dermit v. Uruguay*, Case No. 84/1981, Views adopted on 21 October 1982.

[12] Enforced disappearances "shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and whereabouts of persons who have disappeared and these facts remain unclarified". Similarly, article 3 of the Inter-American Convention on the Forced Disappearance of Persons states that the offence of forced disappearance "shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined".

[13] See article 7 of the Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session 2001 and article 2, paragraph 3 of the Covenant.

[14] Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

[15] See article 1, paragraph 2 of the Declaration on the Protection of All Persons from Enforced Disappearances, General Assembly resolution 47/133, 47 UN GAOR Supp. (No. 49) at 207, UN Doc. A/47/49 (1992). Adopted by General Assembly resolution 47/133 of 18 December 1992.

[16] See *El Megreisi v. Libyan Arab Jamahiriya*, Case No. 440/1990, Views adopted on 23 March 1994.

[17] *Quinteros v. Uruguay*, Case No. 107/1981, Views adopted on 21 July 1983.

W. Communication No. 960/2000, *Baumgarten v. Germany** (Views adopted on 31 July 2003, seventy-eighth session)

Submitted by:	Klaus Dieter Baumgarten
Alleged victim:	The author
State party:	Germany
Date of communication:	30 September 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 July 2003,

Having concluded its consideration of communication No. 960/2000, submitted to the Human Rights Committee by Mr. Klaus Dieter Baumgarten under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Klaus Dieter Baumgarten, a German citizen, who, at the time of his initial submission, was imprisoned in the prison of Düppel in Berlin, Germany.[1] He claims to be the victim of violations by Germany of articles 15 and 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

Facts

2.1 From 1979 until his retirement in February 1990, the author was Deputy Minister of Defence and Head of Border Troops (*Chef der Grenztruppen*) of the former German Democratic Republic (GDR).

2.2 On 10 September 1996, the Regional Court of Berlin (*Landgericht Berlin*) convicted the author of homicide[2] and attempted homicide in several cases occurring between 1980 and 1989, sentencing him to a prison term of six years and six months. The Court found that the author was responsible for the killing or attempted killing of the persons concerned, who, upon attempting to cross the border between the former GDR and the Federal Republic of Germany (FRG) including West Berlin, were shot by border guards or set off mines. On 30 April 1997, the Federal Court (*Bundesgerichtshof*) dismissed the author's appeal. The Federal Constitutional Court (*Bundesverfassungsgericht*) rejected his constitutional motion on 21 July 1997, holding that the previous court decisions did not violate constitutional law.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 The author testified before the Regional Court of Berlin that, since 1960, the highest military organ of the former GDR, the National Defence Council formulated general policy guidelines on the protection and defence of the border, which had to be implemented by the Minister of Defence. The border troops (*Grenztruppen*) were directly subordinate to the Minister of Defence; the Head of Border Troops was, at the same time, one of the Deputy Ministers.

2.4 In order to implement the general policy guidelines of the National Defence Council, the Minister of Defence issued his annual order No. 101 for the protection of the border to the Head of Border Troops who, in turn, spelled out the required defence and security measures in more concrete terms in annual order No. 80. The content of this order was thereupon further interpreted and refined through the different levels of hierarchy in the border troops, and eventually reached every unit for implementation.

2.5 As Head of Border Troops and under his sole responsibility, the author issued the following orders: No. 80/79 of 6 October 1979, No. 80/80 of 10 October 1980, No. 80/81 of 6 October 1981, No. 80/83 of 10 October 1983, No. 80/84 of 9 October 1984, No. 80/85 of 18 October 1985, No. 80/86 of 15 October 1986 and No. 80/88 of 26 September 1988. Excerpts from these orders[3] are cited in the judgement of the Berlin Regional Court:

> "The guard sections and units must reliably and without interruption guard, in the border sections assigned to them, the inviolability of the State border of the German Democratic Republic, apprehend border violators, and not permit border violations or the expansion of border provocations onto the State territory of the GDR. […] The effectiveness of border security should be further increased. […]
>
> [Border guards] are to be trained to act in a way that is politically clever, decisive and shows initiative. [They are] primarily to be trained to apprehend border violators or provocateurs without having resort to firearms. In marksmanship training, soldiers should be enabled to handle their personal firearms safely and to safely combat targets that appear and that move by day and night. These tasks should be carried out with the least amount of ammunition."[4]
>
> "The readiness and ability of the forces deployed in the Border Service to prevent any attack on the State border through politically correct and tactically clever, decisive, active, cunning and resourceful action is to be further perfected. […] [S]taff deployed for securing the border are trained in the uncompromising use of firearms in carrying out the combat order, if all other means of apprehension have been exhausted, in accordance with the regulations on the use of firearms […]

Particular attention is to be paid to constantly ensuring the functionality and full effectiveness of the [border] installations. There should be [...] 39.2 km of border fence I, 10 facilities or border installations with fragmentation mines [...]. Transformation and main repair is to be implemented at [...] border installations with fragmentation mines, 6 facilities, 104 km border fence I. [...] In order to support the 'pioneer' and signal expansion in Border Command South, the exceptional service of two 'pioneer' companies should be ensured [...] from 24 June 1982 to 15 October 1982 [...]. The maintenance staff for the border installations with fragmentation mines [...] should not be deployed in 24-hour shifts. They should be planned and deployed for at least 15 working days of maintenance work per month. [...]

The efforts are to be directed at enabling the border soldiers to act in a way that is politically clever and shows initiative as well as determination in the Border Service, [...] to hit their targets whether these appear and move by day or by night."[5]

"Border training is to be organized as a whole and shall respond to the requirements of reliably securing the State border day and night. The soldiers are to be trained in accurate shooting to combat [...] targets in all situations and shall be enabled to use their personal firearm in accordance with the legal provisions and military regulations, as well as in a responsible and decisive manner, in the border area. To apprehend border violators and provocateurs using physical force, border troops shall receive training in border-related close combat."[6]

"Through the coordinated, dispersed employment of forces and means, [...] attempts of border violations and other attacks on the State border should be recognized in time and be prevented reliably and through determined action."[7]

"The focus should be on [...] the fast and precise recognition of indications of the preparation and the carrying out of border violations and provocations, actions in the border service which are politically clever, offensive as well as controlled under all circumstances, quick and targeted actions to arrest border violators without using firearms, [...] the prevention of border breakthroughs and the successful defence against border provocations [...]. In marksmanship training, the members of the border troops and units [...] are to be trained in such a way that they hit the target with the first shot [...] within the first third of the combat time available [...]. The focus is to be placed on [...] combating small targets at direct shooting distance with the personal firearm or with double arms."[8]

"Combat and special training should enable the units, services, crews and border guards to recognize any indications of the preparation and the carrying out of border violations in good time, to act decisively and with initiative to prevent border violations, to successfully prevent border provocations and armed attacks on the territory of the GDR. [...] Effective measures are to be taken to improve marksmanship training. [...] [M]embers of the border guard should become more able to use their arms safely, to hit their target under all conditions and [...] with the first shot."[9]

Domestic context and legislation

3.1 Between 1949 and 1961, approximately two and a half million Germans fled from the German Democratic Republic to the Federal Republic of Germany, including West Berlin. To stop this flow of refugees, the GDR started construction of the Berlin Wall on 13 August 1961 and reinforced security installations along the inner-German border, in particular by installing landmines, later replaced by SM-70 fragmentation mines. Hundreds of persons lost their lives attempting to cross the border, either because they set off mines, or because they were shot by East German border guards.

3.2 Following German reunification, public prosecutors started to investigate the killings of persons at the former inner-German border on the basis of the Treaty on the Establishment of a Unified Germany of 31 August 1990 (*Einigungsvertrag)*. The Unification Treaty, taken together with the Unification Treaty Act of 23 September 1990 declares, in the transitional provisions relating to the Criminal Code (articles 315 to 315c of the Introductory Act to the Criminal Code), that, as a rule, the law of the place where an offence was committed remains applicable for acts that occurred prior to the time when unification became effective. For offences committed in the former GDR, the Criminal Code of the former GDR remains applicable. Pursuant to section 2, paragraph 3, of the Criminal Code (FRG), the law of the FRG is applicable only if it is more lenient than that of the GDR.

3.3 The first chapter of the Special Section of the Criminal Code (GDR), entitled "Crimes against the national sovereignty of the German Democratic Republic, peace, humanity and human rights", included the following introduction:

> "The merciless punishment of crimes against the national sovereignty of the German Democratic Republic, peace, humanity and human rights, and of war crimes, is an indispensable prerequisite for stable peace in the world, for the restoration of faith in fundamental human rights and the dignity and worth of human beings, and for the preservation of the rights of everyone."
>
> Section 95 of the Criminal Code (GDR) provided:
>
> "Any person whose conduct violates human or fundamental rights, international obligations or the national sovereignty of the German Democratic Republic may not invoke statute law, an order or instruction as justification; he shall be held criminally responsible."
>
> Sections 112 and 113 of the Criminal Code (GDR) sanctioned murder and "manslaughter":
>
> Section 112
>
> Murder
>
> "(1) Any person who intentionally kills another person shall be punished with no less than ten years' imprisonment or with life imprisonment.
>
> [...]

(3) Preparation and the attempt shall be punishable."

Section 113

Manslaughter

"(1) The intentional killing of a person shall be punished with imprisonment of up to ten years if:

1. the offender, without his own guilt, has been placed in a State of considerable excitement by mistreatment, serious threat or serious insult done to himself/herself or his/her family members by the person killed, and was forced or influenced thereby to commit the homicide;

2. a woman kills her child during or immediately following birth;

3. particular circumstances exist relating to the offence, reducing responsibility under criminal law.

(2) The attempt shall be punishable."

Article 258 of the Criminal Code (GDR) provided:

"(1) Members of the armed forces shall not be criminally responsible for acts committed in execution of an order issued by a superior, save where execution of the order manifestly violates the recognized rules of public international law or a criminal statute.

(2) Where a subordinate's execution of an order manifestly violates the recognized rules of public international law or a criminal statute, the superior who issued that order shall also be criminally responsible.

(3) Criminal responsibility shall not be incurred for refusal or failure to obey an order whose execution would violate the rules of public international law or a criminal statute."

3.4 Pursuant to section 17, paragraph 2, of the People's Police Act (*Volkspolizeigesetz*) of 11 June 1968, the use of firearms was justified:

"(a) to prevent the imminent commission or continuation of an offence (*Straftat*) which appears, according to the circumstances, to constitute:

- a serious crime (*Verbrechen*) against the sovereignty of the German Democratic Republic, peace, humanity or human rights;
- a serious crime against the German Democratic Republic;
- a serious crime against the person;

> - a serious crime against public safety or the State order;
> - any other serious crime, especially one committed through the use of firearms or explosives;
>
> (b) to prevent the flight or effect the re-arrest of persons:
>
> - who are strongly suspected of having committed a serious crime or who have been arrested or imprisoned for committing a serious crime;
> - who are strongly suspected of having committed a lesser offence (*Vergehen*), or who have been arrested, taken into custody or sentenced to prison for committing an offence, where there is evidence that they intend to use firearms or explosives, or to make their escape by some other violent means or by assaulting the persons charged with their arrest, imprisonment, custody or supervision, or to make their escape jointly with others;
> - who have received a custodial sentence and been incarcerated in a high-security or ordinary prison;
>
> (c) against persons who attempt by violent means to effect or assist in the release of persons arrested, taken into custody or sentenced to imprisonment for the commission of a serious crime or lesser offence.
>
> (3) The use of firearms must be preceded by a clear warning or warning shot, save where imminent danger may be prevented or eliminated only through targeted use of the firearm.
>
> (4) When firearms are used, human life should be preserved wherever possible. Wounded persons must be given first aid, subject to the necessary security measures being taken, as soon as implementation of the police operation permits.
>
> (5) Firearms must not be used against persons who appear, from their outward aspect, to be children, or when third parties might be endangered. If possible, firearms should not be used against juveniles or female persons.
>
> (6) The use of firearms shall be regulated in detail by the Minister of the Interior and Head of the German People's Police […]."

Under section 20, paragraph 3, of the People's Police Act, these provisions were also applicable to members of the National People's Army (*Nationale Volksarmee*).

3.5 On 1 May 1982, the Act on the State Border (*Grenzgesetz*) of the GDR entered into force, replacing section 17, paragraph 2, of the People's Police Act insofar as the use of firearms by border guards was concerned. Section 27 of the State Border Act reads:

> "(1) The use of firearms is the most extreme measure entailing the use of force against the person. Firearms may be used only where resort to physical force, with or without

> the use of mechanical aids, has been unsuccessful or holds out no prospect of success. The use of firearms against persons is permitted only where shots aimed at objects or animals have not produced the desired result.
>
> (2) The use of firearms is justified to prevent the imminent commission or continuation of an offence (*Straftat*) which appears in the circumstances to constitute a serious crime (*Verbrechen*). It is also justified in order to arrest a person strongly suspected of having committed a serious crime.
>
> (3) The use of firearms must in principle be preceded by a clear warning or warning shot, save where imminent danger may be prevented or eliminated only through targeted use of the firearm.
>
> (4) Firearms must not be used when:
>
> (a) the life or health of third parties may be endangered;
>
> (b) the persons appear, from their outward aspect, to be children; or
>
> (c) the shots would violate the sovereign territory of a neighbouring State.
>
> If possible, firearms should not be used against juveniles or female persons.
>
> (5) When firearms are used, human life should be preserved where possible. Wounded persons must be given first aid, subject to the necessary security measures being taken."

3.6 By contrast with the use of firearms, the installation of mines was not regulated by statutory law, but by a series of service regulations and orders which provided for measures to secure border installations through mines, as well as the use of firearms.[10]

3.7 The term "serious crime" (*Verbrechen*) referred to in section 17, paragraph (2) (a), of the People's Police Act and in section 27, paragraph 2, of the State Borders Act was defined in section 1, paragraph 3, of the Criminal Code:

> "Serious crimes are attacks dangerous to society (*gesellschaftsgefährliche Angriffe*), against the sovereignty of the German Democratic Republic, peace, humanity or human rights, war crimes, offences against the German Democratic Republic and deliberately committed criminal acts against life (*vorsätzlich begangene Straftaten gegen das Leben*). Similarly considered crimes are other offences dangerous to society which are deliberately committed against the rights and interests of citizens, socialist property and other rights and interests of society, and constitute serious violations of socialist legality and which, on that account, are punishable by at least two years' imprisonment or in respect of which, within the limits of the penalties applicable, a sentence of over two years' imprisonment has been imposed."

3.8 In principle, the GDR denied its citizens the right to travel to a Western country including the FRG and Berlin (West). Approval was required to travel to these countries. Under the legal provisions applicable to the issuance of passports and visas in the GDR, it was, however, impossible for persons who enjoyed no political privileges, had not reached retirement age or had not been exempted on the basis of certain types of urgent family business, to leave the GDR legally for a Western country. Crossing the border without an authorization constituted a criminal offence under section 213 ("Illegal border crossing") of the Criminal Code (GDR) which read:

> "(1) Any person who illegally crosses the border of the German Democratic Republic or contravenes provisions regulating temporary authorization to reside in the German Democratic Republic and transit through the German Democratic Republic shall be punished by a custodial sentence of up to two years, a suspended sentence with probation, imprisonment or a fine.
>
> (2) [...]
>
> (3) In serious cases, the offender shall be sentenced to one to eight years' imprisonment. Cases are to be considered serious in particular where:
>
> 1. the offence endangers human life or health;
>
> 2. the offence is committed through the use of firearms or by dangerous means or methods;
>
> 3. the offence is committed with particular intensity;
>
> 4. the offence is committed by means of forgery, falsified documents or documents fraudulently used, or through the use of a hiding place;
>
> 5. the offence is committed jointly with others; or
>
> 6. the offender has already been convicted of illegally crossing the border.
>
> (4) Preparation and attempt shall be criminal offences."

3.9 Serious cases of illegal border crossing, as defined in section 213, paragraph 3, of the Criminal Code, included the use of a ladder to climb over border fences, which was considered a commission of the offence by the use of dangerous means (sect. 213, para. 3, No. 2),[11] and the crossing of the border under considerable physical efforts (sect. 213, para. 3, No. 3: "particular intensity").[12] Depending on the intensity of commission, such acts constituted either misdemeanours (*Vergehen*) or serious crimes (*Verbrechen*).[13] Frequently, serious cases of illegal border crossing were deemed to constitute serious crimes,[14] either because they were punishable by more than two years' imprisonment[15] or because they were considered "attacks dangerous to society" or a "serious violation of socialist legality",[16] under section 1, paragraph 3, of the Criminal Code (GDR).

3.10 No member of the border troops was ever prosecuted in the GDR for ordering the use of firearms or for executing such orders.

3.11 The Covenant entered into force for the German Democratic Republic on 23 March 1976. However, it was never incorporated into the GDR's domestic legal order by Parliament (*Volkskammer*), as required by article 51[17] of the GDR Constitution.[18]

The procedure before the domestic tribunals

4.1 The Berlin Regional Court, in its judgement of 10 September 1996, found that, based on the provisions on homicide of the GDR Criminal Code, the author was responsible for the deaths or injuries inflicted on persons trying to cross the border at the inner-German border or, respectively, the Berlin Wall, by virtue of his annual orders, triggering a chain of subsequent orders and, thereby, inciting the acts committed by border guards in the cases at issue. While the Court recognized that it was not the author's direct intention to cause the death of border violators, it argued that he was fully aware, and accepted, that, as a direct consequence of the application of these orders, persons attempting to cross the border could lose their lives. It rejected the author's claim that he had erred about the prohibited nature of his orders, since such error was avoidable, given his high military rank, his competencies and the fact that his orders manifestly violated the right to life, thereby infringing the criminal laws of the GDR. It held that the author's acts were neither justified by the pertinent service regulations issued by the Minister of National Defence, nor under article 27, paragraph 2, of the State Border Act, arguing that these legal justifications were invalid because they manifestly violated basic principles of justice and internationally protected human rights, as enshrined in the International Covenant on Civil and Political Rights.

4.2 The Court argued that, by giving priority to the inviolability of the GDR's State borders over the right to life of unarmed fugitives who attempted to cross the inner-German border, these grounds of justification violated legal principles based on the intrinsic worth and dignity of the human person and recognized by the community of nations. The Court concluded that in such a case, the positive law had to be superseded by considerations of justice. Such a finding did not constitute a breach of the principle of non-retroactivity in article 103, paragraph 2, of the German Basic Law (*Grundgesetz*), since the expectation that the law, as applied in GDR State practice, would continue to be applied so as to broadly construe a legal justification contrary to human rights, did not merit protection of the law. The Court dismissed order No. 101 as a lawful excuse, holding that under article 258, paragraph 1, of the Criminal Code (GDR), criminal responsibility was not excluded where the execution of an order manifestly violated recognized rules of public international law or a criminal statute. In assessing the punishment, the Court balanced the following aspects: (1) the totalitarian structure of the GDR which left the author only with a limited scope of action, (2) the author's high age and his expressions of regret for the victims, (3) the considerable lapse of time since the commission of the acts, (4) his (albeit avoidable) error as to the unlawfulness of his acts (in his favour), and (5) his participation, at a high level of hierarchy, in the maintenance and increased sophistication of the system of border control (to his detriment). Based on the relevant provisions of the Criminal Code (FRG), which were more lenient than the corresponding norms of the Criminal Code (GDR), the Court decided to impose a reduced sentence.

4.3 The Federal Constitutional Court, in its decision dated 21 July 1997, rejected the author's constitutional complaint that the decisions of the Berlin Regional Court and the Federal Court violated the principle of non-retroactivity in article 103, paragraph 2, of the Basic Law by retroactively declaring acts punishable which, under GDR law, had been lawful. The Court stated that it was precluded from reviewing the interpretation and application of the criminal law of the former GDR, its review being limited to the question of whether constitutional law had been violated by the lower courts' decisions. The Court found no breach of article 103, paragraph 2, of the Basic Law since the author's expectation that his acts were justified under GDR practice did not merit constitutional protection. By reference to its previous decision on border shootings,[19] the Court reiterated that the bona fide basis protected by article 103, paragraph 2, of the Basic Law was absent where a State codified norms which sanction the most severe criminal wrongs, such as the intentional killing of human beings, but at the same time provide for legal justifications that exclude criminal responsibility, and thereby encourage the commission of such wrongs and disregard universal human rights recognized by the community of nations. The strict protection, in article 103, paragraph 2, of the Basic Law, of the legitimate expectation of the legality of one's acts did not apply in the particular case, especially since the injustice of the GDR's system of border control could only prevail as long as that State had existed.

The complaint

5.1 The author claims that he is a victim of violations of articles 15 and 26 of the Covenant, because he was convicted for acts committed in the line of duty which did not constitute a criminal offence under GDR law or under international law.

5.2 With regard to the alleged violation of article 15 of the Covenant, the author claims that, by judging his acts, the State party's courts deprived the relevant GDR legislation of its original meaning, replacing it by their own concept of justice. He argues that the reasoning of the Courts amounts to the absurd contention that the East German Parliament placed members of the armed forces at double jeopardy, by enacting criminal laws requiring them to comply with their professional duties, and at the same time criminalizing such compliance, eventually only in order to prevent the prosecution of the fulfilment of such duties by means of legal justifications. He submits that compliance with professional duties never constituted a criminal offence under GDR law since it was not contrary to the interests of society, as required by section 1, paragraph 1, of the Criminal Code (GDR). On the contrary, non-compliance with service regulations or orders governing the protection of the State borders itself entailed criminal responsibility, the only exception pertaining to cases where the order manifestly violated the recognized rules of public international law or a criminal statute (section 258 of the GDR's Criminal Code).

5.3 The author contends that international law did not prohibit the installation of mines along the border between two sovereign States which, moreover, marked the demarcation line between the two largest military alliances in history and had been ordered by the Commander-in-chief of the Warsaw Pact. He notes that the mines were only used in military exclusion zones, were clearly indicated by warning signs, and that involuntary access was prevented by high fences. He further claims that, when considering the second periodic report of the GDR in 1983, the Committee found the East German system of border control to be in conformity with the Covenant.

5.4 Furthermore, the author argues that criminal intent required the apparent and wilful disregard of certain basic social norms, which obviously was not the case in instances of compliance with one's professional duties.

5.5 According to the author, at the time of the entry into force of the Unification Treaty on 3 October 1990, no basis for prosecuting his acts existed. The legal system of the GDR did not provide for incurring criminal responsibility on the sole basis of natural law concepts, which had no foundation in the GDR's positive law. When the FRG agreed to include the prohibition of the retroactive application of its criminal law in the Unification Treaty, it did so in the light of the historically unique chance to unify both German States, accepting that its own concepts of justice could not be applied to acts committed in the former GDR. The author concludes that his conviction, therefore, lacked a legal basis in the Unification Treaty.

5.6 With respect to the reference to "international law" in article 15, paragraph 1, and the limitation clause in article 15, paragraph 2, of the Covenant, the author submits that at the material time, his acts were not criminal under international law, nor under the general principles of law recognized by the community of nations.

5.7 Regarding the alleged violation of article 26 of the Covenant, the author claims that he had been discriminated against as a former citizen of the GDR because the German courts failed to apply the statutory provisions of the FRG relating to the use of firearms, which stipulate that the knowledge of the danger of such arms did not imply an intent to kill, to his case, and instead presumed that he had accepted the death of border violators as a consequence of his orders pertaining to the use of firearms.

5.8 The author states that he has exhausted all available domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement.

State party's observations on admissibility and merits

6.1 By note verbale of 5 September 2001, the State party made its submission on the admissibility and merits of the communication. It confirms the facts of the case as submitted by the author. However, it disputes the allegation that the author's conviction violated articles 15 and 26 of the Covenant.

6.2 As to the alleged violation of article 15 of the Covenant, the State party recalls that the Regional Court of Berlin found that the author's acts were punishable under GDR law at the time of their commission. It quotes extensively from a landmark decision of the Federal Court,[20] which is also cited in the judgement of the Berlin Regional Court.[21] According to that decision, the legal justification in section 27, paragraph 2, of the Border Act, as applied in the GDR's State practice, had to be disregarded in the application of the law because it violated basic notions of justice and humanity in such an intolerable manner that the positive law must give way to justice (so-called *Radbruch formula*).[22] In assessing the conflict with material justice, the Court refers to the Covenant, in particular articles 6 and 12, as "more specific criteria" for that assessment, concluding that the restrictive visa policy of the GDR was inconsistent with the limitations clause in article 12, paragraph 3, of the Covenant since it made the exception to the freedom to leave one's own country the general rule, thereby ignoring the close ties between the Germans from both States who belonged to one and the same nation. Similarly, the Court found the use of firearms against border violators, in its unprecedented perfection, to be inconsistent with article 6, since it was disproportionate to the itself illegitimate aim of deterring third persons from crossing the border without authorization. On these premises, the Court held that section 27, paragraph 2, of the Border Act had to be disregarded as a ground for justification because the GDR itself should have interpreted that provision restrictively on the basis of its international obligations, its constitutional provisions and the principle of proportionality laid down in article 30, paragraph 2, of the GDR Constitution and in section 27, paragraph 2, of the Border Act. In the Court's opinion, section 27, paragraph 2, first sentence, had to be construed as follows: "The border guard was allowed to use a firearm to prevent flight in the cases referred to there; but the ground for justification met its limits when, with conditional or unconditional intent to kill, shots were fired on a refugee who, in the circumstances, was unarmed and also did not otherwise constitute a danger to the life and limb of others."

6.3 The State party invokes another judgement,[23] in which the Federal Court recalled that the GDR had always stated that it endorsed the principles of the United Nations and that article 91 of the GDR Constitution declared the generally recognized rules of international law on the punishment of crimes against humanity and of war crimes to be directly applicable law. The State party concludes from both judgements that the Federal Court did not, therefore, rely on international law, but derived its assessment that the author's acts were punishable from the domestic law of the GDR. The fact that these offences were not prosecuted in the GDR does not imply that they did not constitute criminal offences.

6.4 The State party refers to the Federal Constitutional Court's landmark decision[24] on the issue, which emphasized that, in the absence of a legitimate expectation not to be punished, the prohibition of the retroactive application of criminal laws in article 103, paragraph 2, of the Basic Law was not applicable to situations where the other State (the GDR) made provision for criminal offences to cover the most serious criminal wrongs, but at the same time excluded criminal liability through grounds of justification which went beyond the written norms, instigated such wrongs, and violated human rights recognized by the community of nations. In the interest of material justice, the strict application of article 103, paragraph 2, must give way. Otherwise the administration of criminal justice in the Federal Republic would run counter to its own rule of law premises. Although the wording of the GDR's provisions on the use of firearms at the inner-German border corresponded to that of the FRG's provisions on the use of force, the written law of the GDR was, in fact, eclipsed by the requirements of political expediency, which subordinated the individual's right to life to the State's interest in preventing the unauthorized crossing of its borders. In the absence of any admissible justification for the border killings, the definition of homicide in sections 112 and 113 of the Criminal Code applied to the author's acts.

6.5 The State party recalls that, in accordance with the Committee's jurisprudence, it is primarily for the courts and authorities of the State party to interpret and apply domestic law. Only if such interpretation or application is arbitrary may the Committee intervene. The decisions of the German courts with regard to the author were, however, not arbitrary.

6.6 The State party submits that article 15 of the Covenant only applies if the person concerned cannot reasonably ascertain, from the wording of the law, that his or her acts are punishable and also cannot foresee that he could be held criminally responsible for his acts. Given the author's position as a trained and qualified, high-ranking "military scientist", it should have been obvious to him that his orders were contrary to articles 6 and 12 of the Covenant, and that he could be prosecuted for his acts, should the political circumstances in the GDR change.

6.7 The State party rejects the author's claim that the Committee never found the GDR's system of border control to be in violation of the Covenant and recalls that, prior to 1992, the Committee did not adopt concluding observations on the human rights situation in reporting States parties. However, when the former GDR presented its first and second periodic reports before the Committee in 1978 and in 1984, several Committee members expressed clear criticism with regard to the system of border control. The author should also have noted the disapproval of the system of border control in the practice of international organizations, in particular the appearance of the former GDR on the "1503-list" of the Commission on Human Rights, from 1981 to 1983, precisely because of border killings and violations of article 13 of the Universal Declaration of Human Rights.

6.8 The State party concludes that, in line with the Committee's general comment No. 6[25] as well as its consistent jurisprudence,[26] it is legally obliged under article 6, paragraph 1, of the Covenant to prosecute and punish those who arbitrarily deprived citizens of the former GDR of their lives. Subsidiarily, it submits that the author's conviction could be covered by article 15, paragraph 2, of the Covenant if his acts were criminal at the material time, according to the general principles of justice recognized by the community of nations. In that regard, the State party emphasizes the close link between the Nuremberg Principles and the *Radbruch formula* and contends that the system of border control led to grave violations of human rights.

6.9 With respect to the alleged violation of article 26 of the Covenant, the State party submits that the author's prosecution was solely based on his personal involvement in the system of border control and that the prohibition of discrimination does not mean that persons cannot be held criminally responsible. Criminal responsibility for offences under GDR law could be incurred by anyone subject to the GDR's criminal law, irrespective of his or her citizenship.

Comments by the author

7.1 By letter of 14 November 2001, the author responded to the State party's submission. He reiterates the arguments stated in his initial communication and adds that article 15 of the Covenant required the German courts to apply the GDR's law of criminal procedure and, in particular, its law of burden of proof to establish his criminal liability. Under the GDR's criminal law, intent to kill could not be presumed on the basis of one's knowledge of the possible lethal consequences of the use of firearms. Instead, the expectation that a border violator would only be injured or would refrain from climbing over mine installations precluded such intent. Self-endangering behaviour always disrupted the chain of cause and effect required to establish criminal liability.

7.2 The author rejects the State party's contention that the GDR's written norms were eclipsed by orders which left no room for weighing the use of firearms against the principle of proportionality, and submits that all military orders and service regulations required soldiers to save the life of border violators, whenever possible.

7.3 Furthermore, he argues that, even in the hypothesis that fulfilment of military duties constituted a criminal offence under GDR law, the Unification Treaty precluded the German courts from negating the existing legal justifications solely because these justifications prevented criminal prosecution of such acts. The fact that German courts systematically violated the Unification Treaty does not make the State party's position any more justifiable.

7.4 The author admits that the GDR was bound by its legal obligations under the Covenant. However, since he was not identical with the GDR as a subject of international law, the Covenant could not create rights or duties for him, let alone establish his criminal liability, in the absence of an incorporation of that instrument into the GDR's domestic law. He indicates that, pursuant to article 2, paragraph 2 (b), of the European Convention for the Protection of Human

Rights and Fundamental Freedoms, deprivation of life does not violate the human right to life when it results from the use of force which is absolutely necessary in order to effect a lawful arrest or to prevent the escape of a person lawfully detained.

7.5 The author submits that the installation of mines at the inner-German border was a preventive military measure against a possible attack by NATO forces. He denies that the mines were deployed with the intent to kill people. Instead, their enclosure by fences and the placement of clearly visible warning signs were intended to deter border violators from entering mined areas. No one forced border violators to enter the minefields, the danger of which was known to them. The author recalls that border guards were never required to make excessive use of their firearms. Border violators were always warned by shouts to stop and by at least one warning shot. They could always stop their attempt to cross the border to prevent being shot at; shots were always aimed at their feet. According to the author, the death of persons attempting to cross the border was an exception rather than the general rule.

7.6 The author argues that, because of the complex chain of orders, a high-ranking member of the armed forces can never directly control the use of firearms in each individual case, but is limited to setting out the requirements for such use which have to be respected by each individual soldier. Although the use of firearms frequently implies a risk to life, ordering such use cannot be equated to intentionally killing the person concerned. Furthermore, the author argues that he cannot be held responsible for the GDR's visa policy.

7.7 The author submits that the State party's Parliament (*Bundestag*) enacted a law in 1993 which retroactively stayed the statutory limitations contained in sections 82 and 83 of the Criminal Code (GDR) for the period during which offences committed in relation to the system of border control had not been prosecuted in the GDR for political reasons. He argues that the State party ignored the adoption by the State Council (*Staatsrat*), the GDR Government, of a general amnesty, dated 17 July 1987, which also applied to acts of homicide committed prior to 7 October 1987.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee also notes that the State party did not contest the admissibility of the communication. It therefore considers that there is no obstacle to the admissibility of the communication, and, accordingly, decides that the communication is admissible insofar as it raises issues under articles 15 and 26 of the Covenant.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 As regards the author's claim under article 15, the Committee is called upon to determine whether the conviction of the author for homicide and attempted homicide by the German courts amounts to a violation of that article.

9.3 At the same time, the Committee notes that the specific nature of any violation of article 15, paragraph 1, of the Covenant requires it to review whether the interpretation and application of the relevant criminal law by the domestic courts in a specific case appear to disclose a violation of the prohibition of retroactive punishment or punishment otherwise not based on law. In doing so, the Committee will limit itself to the question of whether the author's acts, at the material time of commission, constituted sufficiently defined criminal offences under the criminal law of the GDR or under international law.

9.4 The killings took place in the context of a system which effectively denied to the population of the GDR the right freely to leave one's own country. The authorities and individuals enforcing this system were prepared to use lethal force to prevent individuals from non-violently exercising their right to leave their own country. The Committee recalls that even when used as a last resort lethal force may only be used, under article 6 of the Covenant, to meet a proportionate threat. The Committee further recalls that States parties are required to prevent arbitrary killing by their own security forces.[27] It finally notes that the disproportionate use of lethal force was criminal according to the general principles of law recognized by the community of nations already at the time when the author committed his acts.

9.5 The State party correctly argues that the killings violated the GDR's obligations under international human rights law, in particular article 6 of the Covenant. It further contends that those same obligations required the prosecution of those suspected of responsibility for the killings. The State party's courts have concluded that these killings violated the homicide provisions of the GDR Criminal Code. Those provisions required to be interpreted and applied in the context of the relevant provisions of the law, such as section 95 of the Criminal Code excluding statutory defences in the case of human rights violations (see paragraph 3.3) and the Border Act regulating the use of force at the border (see paragraph 3.5). The State party's courts interpreted the provisions of the Border Act on the use of force as not excluding from the scope of the crime of homicide the disproportionate use of lethal or potentially lethal force in violation of those human rights obligations. Accordingly, the provisions of the Border Act did not save the killings from being considered by the courts as violating the homicide provisions of the Criminal Code. The Committee cannot find this interpretation of the law and the conviction of the author based on it to be incompatible with article 15 of the Covenant.

10. With regard to the author's allegation of a violation of article 26 of the Covenant, the Committee notes that the Treaty on the Establishment of a Unified Germany provides for the applicability of the criminal law of the former GDR to all acts committed on the territory of the former GDR, prior to the unification becoming effective. The Committee takes note of the author's allegation that certain provisions of the State party's law that would have been applied on the use of firearms by officials of the FRG had not been applied in his case. However, the

Committee observes that the author has failed to demonstrate that persons in a similar situation in the former GDR or FRG have, in fact, been treated differently. Therefore, the Committee concludes that he has not substantiated his claim and considers that there has been no violation of article 26 in this respect.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of articles 15 and 26 of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 23 March 1976 and 25 November 1993 respectively. Upon ratification of the Optional Protocol, the State party entered the following reservation concerning article 5, paragraph 2 (a): "The Federal Republic of Germany formulates a reservation concerning article 5, paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications:

(a) which have already been considered under another procedure of international investigation or settlement; or

(b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany;

(c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

[2] Referred to as "manslaughter" in the State party's submissions.

[3] The English translations of these excerpts are based on the translations provided by the State party.

[4] Order No. 80/79 of 6 October 1979 (excerpts).

[5] Order No. 80/81 of 6 October 1981 (excerpts).

[6] Order No. 80/83 of 10 October 1983 (excerpts).

[7] Order No. 80/84 of 9 October 1984 (excerpts).

[8] Order No. 80/85 of 18 October 1985 (excerpts).

[9] Order No. 80/86 of 15 October 1986 (excerpts).

[10] See the Federal Constitutional Court's decision of 21 July 1997, at pp. 4-5 (referring to the Federal Constitutional Court's decision of 24 October 1996 - BVerfGE 95, 96).

[11] Cf. Ministry of Justice of the German Democratic Republic (ed.), *Strafrecht der Deutschen Demokratischen Republik: Kommentar zum Strafgesetzbuch*, Berlin 1987, p. 475.

[12] Ibid.

[13] Ibid., p. 474.

[14] Cf. Alexy, Robert, *Mauerschützen - zum Verhältnis von Recht, Moral und Strafbarkeit* (1993), at p. 11; Brunner, G., "Recht auf Leben", in: Brunner, G. (ed.), *Menschenrechte in der DDR* (1989), at p. 120; Polakiewicz, Jörg, "Verfassungs- und völkerrechtliche Aspekte der strafrechtlichen Ahndung des Schußwaffeneinsatzes an der innerdeutschen Grenze", *Europäische Grundrechtezeitschrift* (1992), at p. 179.

[15] See Alexy, *Mauerschützen*, at p. 11.

[16] See ibid., at pp. 11-12.

[17] Article 51 of the GDR Constitution reads: "Parliament (the *Volkskammer*) approves State treaties of the German Democratic Republic and other international treaties, insofar as they modify Acts of Parliament. It decides upon the termination of such treaties."

[18] See Alexy, *Mauerschützen*, at pp. 16-17 (with further references).

[19] BVerfGE 95, 96 ("Mauerschützen").

[20] BGHSt 39, p. 1, at pp. 15 et seq.

[21] See pp. 104-106 of the Berlin Regional Court's judgement of 10 September 1996.

[22] See Radbruch, Gustav, "Gesetzliches Unrecht und übergesetzliches Recht", *Süddeutsche Juristen-Zeitung* (1946), p. 105, at p. 107.

[23] BGHSt 40, p. 241, at pp. 245 et seq.

[24] BVerfGE 95, p. 96, at pp. 133 et seq.

[25] See Human Rights Committee, sixteenth session (1982), general comment No. 6, at paragraph 3.

[26] In this regard, the State party refers to, inter alia, Communication No. 161/1983, *Joaquin Herrera Rubio v. Colombia*, Views adopted on 2 November 1987, UN Doc. CCPR/C/31/D/161/1983, at paragraphs 10.3 and 11.

[27] Human Rights Committee, sixteenth session (1982), general comment No. 6: article 6, at paragraph 3.

X. Communication No. 981/2001, *Gomez Casafranca v. Peru*[*]
(Views adopted on 22 July 2003, seventy-eighth session)

Submitted by:	Teofila Casafranca de Gomez
Alleged victim:	Ricardo Ernesto Gómez Casafranca
State party:	Peru
Date of communication:	26 October 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 July 2003,

Having concluded its consideration of communication No. 981/2001, submitted to the Human Rights Committee by Mr. Ricardo Ernesto Gómez Casafranca under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 26 October 1999, is Teófila Casafranca de Gómez, representing her son, Ricardo Ernesto Gómez Casafranca, a Peruvian citizen currently imprisoned after having been sentenced to 25 years' imprisonment for the offence of terrorism. Although the author does not cite specific provisions of the Covenant, the communication may raise issues under articles 7; 9, paragraphs 1 and 3; 14, paragraphs 1, 2 and 3 (c); and 15 of the International Covenant on Civil and Political Rights, which entered into force for Peru on 28 April 1978. The Optional Protocol entered into force on 2 October 1980. The author is represented by counsel.

The facts as submitted by the author

2.1 The victim was a student at the Faculty of Dentistry of the Inca Garcilaso de la Vega University, and also worked in the family restaurant. On 3 October 1986 he was arrested in a building near to his home, where he had gone to clean up after being stopped at gunpoint by the police. The arrest was made without any arrest warrant, and without the detainee having been arrested in flagrante delicto; he was taken to the offices of DIRCOTE,[1] where he was locked in the cells while the police made inquiries.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 According to the author, the victim was subjected to cruel and savage physical, psychological and mental torture. In the records of the second oral hearing, held in 1998, the prisoner states that he was tortured to obtain certain statements. Specifically, he tells of how they bent back his hands and twisted his arms, hoisted him up in the air, put a pistol in his mouth, took him to the beach and attempted to drown him, and later attempted to rape him by inserting a candle in his anus. On 7 September 2001 Mr. Gómez Casafranca reported the torture to which he had been subjected while at DIRCOTE on 3 October 1986 to the National Police Department of Human Rights. On 17 September 2001 the Department issued a finding in which it noted that the victim had been advised by counsel and that he had not submitted a complaint in a timely manner. Mr. Casafranca was charged with homicide, bodily injury and terrorist acts. The author maintains that her son always maintained his innocence and did not even know the other accused persons who, possibly owing to the torture to which they too were subjected, implicated him in the offence.

2.3 According to the author, the police, in an utterly arbitrary act, brought charges against the prisoner in attestation No. 91-D4-DIRCOTE of 22 October 1986, implicating him in acts which he neither committed nor participated in. According to the DIRCOTE police attestation, Ricardo Ernesto Gómez Casafranca, alias "Tomás", was the military militia commander of a terrorist cell of Sendero Luminoso, belonging to the Ñaña Chosica central sector. The cell recruited more members, organized "people's schools", carried out dynamite attacks and fire bombings and sought to destroy police units. The attestation states that Ricardo Ernesto Gómez Casafranca is the perpetrator, with others, of a terrorist offence in that on 31 July 1986 he took part in the fire bombing, using home-made devices, of the Papelera Peruana SA company. The author was also accused of other offences, including offences against human life, the person and health, and against company property. The attestation states that a search of the person of Ricardo Ernesto Gómez Casafranca revealed no weapons, explosives or subversive propaganda. A search of his home also proved negative. Nevertheless, analysis revealed that the writing in several political texts deemed as subversive, was that of Ricardo Ernesto Gómez Casafranca. In addition, the detainees Sandro Galdo Arrieta, Francisco Reyna García, Ignacio Guizado Talaverano and Rosa Luz Tineo Suasnabar accused him of belonging to Sendero Luminoso.

2.4 The prisoner was brought before examining magistrate No. 39 of the Lima High Court, who opened an investigation by issuing an order for his detention on 23 October 1986. The author states that the office of the prosecutor produced no evidence to corroborate the accusations against her son. However, the report of the office of the provincial prosecutor, dated 22 July 1987, states that, as indicated in the police attestation, Mr. Gómez Casafranca, with others, is part of a Sendero Luminoso terrorist cell belonging to the Ñaña Chosica central sector. The report also refers to the various statements by other defendants, who maintained that they had not confirmed their police statement because it had been obtained under torture.[2]

2.5 In the oral proceedings, the judges confined themselves to questioning the alleged victim on the basis of the contentions in the police report, without taking into account events at the pre-trial stage. On 22 December 1988 Lima Seventh Correctional Court acquitted him, declaring him innocent of the charges brought against him.

2.6 The Office of the Attorney-General applied for annulment of the judgement, which was declared void on 11 April 1997 by the faceless Supreme Court. The Court held that the facts had not been properly determined or the evidence properly verified.

2.7 On 11 September 1997 the police arrested Mr. Ricardo Ernesto Gómez Casafranca at his home for an appearance at further oral proceedings based on the same charges; this time, on 30 January 1998, he was sentenced to 25 years' imprisonment by the Special Criminal Counter-Terrorism Division. The sentence was confirmed by the Supreme Court on 18 September 1998.

The complaint

3.1 The author claims violation of the right of her son to protection of the person and to physical, psychological and mental integrity and of his right not to be subjected to torture while being held. She also claims that the victim's right to liberty and security of person has been violated.

3.2 The author further claims that the State party, in pursuing its counter-insurgency policy, has violated judicial guarantees of due process and protection of the courts. She also maintains that there has been a violation of the right to judicial protection, that is, the right to a hearing with due guarantees and presumption of innocence. Moreover, she contends that the sentence handed down against her son was based solely on the transcription of the police report, there being no mention of legal grounds or of individual criminal liability.

3.3 Lastly, the author claims violation of the principle of legality, equality of the victim before the law, and retroactivity.

The State party's observations on admissibility and the merits

4.1 In its communication dated 20 December 2001 the State party acknowledges that all the requirements for admissibility have been met and that the victim has exhausted all domestic remedies and that the matter has not been submitted to any other international body.

4.2 On the merits, the State party indicates that Mr. Gómez Casafranca was arrested under the law on the investigation of terrorist offences and in the context of the 1979 Constitution then in force. Legislative Decree No. 46, adopted on 10 March 1981, that is before the alleged victim was arrested, provided, in its article 9, that the police could place in preventive detention for a period not exceeding 15 days those allegedly involved in such offences as perpetrators or participants, subject to providing immediate notification in writing to the Public Prosecutor's Office and within 24 hours to the examining magistrate. Accordingly the police acted in accordance with the law.

4.3 The State party maintains that the communication does not contest the compatibility of Legislative Decree No. 46 with the International Covenant on Civil and Political Rights, or its validity before national courts. The State party asserts that Peruvian judges could have found the decree incompatible with the Constitution had they considered that it was not applicable to the author's son. Neither was the victim the subject of any application for habeas corpus or *amparo*, either at the time of pre-trial detention or during the trial for terrorism. Accordingly, his detention was in accordance with article 9, paragraph 1, of the Covenant.

4.4 Regarding the author's claims that her son was subjected to cruel torture, the State party maintains that the file relating to the pardon[3] contains a copy of medical certificates corroborating the absence of any physical ill-treatment of the victim.

4.5 The State party also asserts that the communication simply refers to torture without specifying the date or the methods of torture to which the victim was allegedly subjected. Accordingly there is no proof of a violation of article 7 of the Covenant.

4.6 The State party asserts that the norms of due process provided for in article 14 of the Covenant have been observed. According to the State party, the author's claims that there was a violation of due process and protection of the courts, of the right to judicial protection and to a hearing with due guarantees, of the principle of the presumption of innocence, and of grounds based on the facts and applicable legislation, have not been substantiated.

4.7 The State party maintains that the victim was judged on conditions of equality by the Peruvian courts. He was heard in public hearings on two occasions, when he appeared before a tribunal composed of professional judges specializing in criminal law, where he had an opportunity to be heard, and where he was able to exercise his right to defend himself, both in person and by counsel of his choosing. According to the State party, the courts that judged him had already been constituted prior to his appearance, in accordance with the legislation then in force: the Code of Criminal Procedure, approved in Act No. 9024 of 23 November 1939; and Decree Law No. 25475, as amended by Act No. 26248[4] and Act No. 26671,[5] and that the latter abolished the so-called "faceless courts". That is, he was not judged in a closed hearing by a "faceless" court, but on two occasions was examined at public hearings by judges comprising a competent (previously established by law), independent (selected on the basis of the institutional guarantees provided for in the Constitution and by law) and impartial tribunal.

4.8 The State party maintains that, although the Criminal Chamber of the Supreme Court which annulled the judgement that had acquitted Mr. Casafranca on 11 April 1997 was a "faceless" Chamber, the judgement had enough reasoning.

4.9 The principle of the presumption of innocence set forth in article 14, paragraph 2, of the Covenant, was respected during the judicial investigation and in the trial. The evidence and other testimony produced in a fair trial led the judges to conclude that the presumption of innocence was unfounded. The Supreme Court concurred in confirming the judgement.

4.10 The State party maintains that the judicial decisions were based on the facts and the law. Although this is not a right expressly set forth in the Covenant, it is in accordance with the concept of due process.

4.11 Regarding the claims that there were violations of the principles of legality, equality before the law and retroactivity, the State party maintains that the courts investigated and punished the alleged victim for the offence of terrorism and applied the special criminal rules relating to investigation and punishment. That is, regarding the procedural norms applied in the 1998 trial, they applied Legislative Decree No. 46 of 10 March 1981, Act No. 24651 of 6 March 1987 and Decree Law No. 25475 of 5 May 1992.

4.12 With regard to the acquittal of 22 December 1988, the State party maintains that the Seventh Correctional Court applied, as substantive criminal legislation, Legislative Decree No. 46, then applicable to the offences attributed to the victim, consisting in the homicide of police officer Román Rojas Saavedra on 22 June 1986, the attempted arson at the Papelera Peruana SA factory on 31 July 1986, the blowing up of high-tension pylons on 27 July 1986, the homicide of police corporal Aurelio da Cruz del Águila on 11 August 1986, the homicide of police officer Rolando Marín Paucar on 2 September 1986 and the planning of the homicide of Enrique Thomas Ojeda, an Aprista Peruano party candidate in Chaclacayo.

4.13 Legislative Decree No. 46 was repealed by article 6 of Act No. 24651 of 6 March 1987. This Act was applied in the conviction of 30 January 1998. The Criminal Division for terrorism offences of the Lima High Court thus applied a legal provision (Act No. 24651) that post-dated the events it considered unlawful. Its decision was endorsed by the Supreme Court on 18 September 1998. However, Legislative Decree No. 46 and Act No. 24651 applied similar penalties to offences constituting terrorism. Accordingly, the author has not demonstrated how this could be incompatible with article 15 of the Covenant.

4.14 Lastly, the State party notes that the acts for which the Peruvian courts sentenced the victim were offences under the applicable national legislation, and that the provision in force at the time can be applied so that the acts are properly classified. The situation could be rectified through a further decision by the courts, rather than by the executive.

4.15 In conclusion, the State party reiterates that it has no observations to make on admissibility, that due process was respected, and that neither the right of the victim to liberty nor to security of person was violated.

The author's comments relating to admissibility and the merits

5.1 The author alleges in her comments that all the assertions by the State party are false, having the sole object of concealing the violation of articles 9 and 14 of the Covenant. According to the author, the State party has not responded to her specific allegations regarding the victim, who has been sentenced to a term of imprisonment after having been tried by a "faceless" court and convicted without evidence or any attribution of material individual liability by applying laws that were not in force when the acts occurred, as in the judgement of 30 January 1998.

5.2 The author claims that the victim was arrested without there being a warrant and without being caught in flagrante delicto. With regard to the period of detention, the law provided for a maximum of 15 days' detention at the police station. Yet the victim was held for 22 days and the judgement made no reference to this. Further, the State party has not provided any information on the torture to which the victim was subjected.

5.3 The author maintains that the judgement is a continuation of the methods applied by the "faceless" courts. The right to due process, the presumption of innocence and burden of proof as well as the principle of legality were violated. Further, the author alleges that the judgement was a literal reproduction of the police attestation in contravention of the principle of legality and equality before the law. She further maintains that the victim was sentenced under a law that was not in force at the time the acts were committed, namely June to December 1986, whereas the sentence was pronounced under Act No. 24651 of 6 March 1987.

5.4 The author states that this judgement violated the principles of liberty and security of person, the principle of equality before the law and retroactivity, the right to due process and effective protection of the courts.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol. It has further ascertained that the victim has exhausted domestic remedies for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.

6.3 The Committee also notes that the State party has not refuted the applicability of article 5, paragraphs 2 (a) and (b), of the Optional Protocol to the case, thereby accepting its admissibility. Accordingly, and bearing in mind the author's claims, the Committee declares the communication admissible and proceeds to consideration of the merits of the case on the basis of the information provided by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

Consideration of the merits

7.1 With regard to the author's claims that her son was subjected to ill-treatment while being held at the police station, the Committee notes that, while the author does not provide further information in this regard, the attached copies of the records of the oral proceedings of 30 January 1998 reveal how the victim described in detail before the judge the acts of torture to which he had been subjected. Taking into account the fact that the State party has not provided any additional information in this regard, or initiated an official investigation of the events described, the Committee finds that there was a violation of article 7 of the Covenant.

7.2 With respect to the allegations of a violation of the right of the victim to liberty and security of person and that her son was arrested without a warrant, the Committee regrets that the State party has failed to provide an explicit response to this claim, merely asserting in general terms that Mr. Gómez Casafranca was arrested in accordance with Peruvian law. The Committee notes the author's claim that her son was held for 22 days at the police station, whereas the law provides for a period of 15 days. The Committee considers that since the State party has not contested these claims due weight must be attached to them. Accordingly the Committee finds that there was a violation of article 9, paragraphs 1 and 3, of the Covenant.

7.3 Regarding the author's claims under article 14, the Committee takes note of the fact that Mr. Gómez Casafranca was, after first being acquitted in 1988, ordered for retrial by a "faceless" Chamber of the Supreme Court. This alone raises issues under article 14, paragraphs 1 and 2.

Taking into account that Mr. Gómez Casafranca was convicted after retrial in 1998, the Committee takes the view that whatever measures were taken by the Special Criminal Counter-Terrorism Chamber to guarantee Mr. Gómez Casafranca's presumption of innocence, the delay of some 12 years after the original events and 10 years after the first trial resulted in a violation of the author's right, under article 14, paragraph 3 (c), to be tried without undue delay. In the circumstances of the case, the Committee concludes that there was a violation of article 14 of the right to a fair trial taken as a whole.

7.4 With regard to the author's claims that there was a violation of the principles of non-retroactivity and equality before the law as a result of the application of Act No. 24651 of 6 March 1987, subsequent to the events in the case, the Committee notes that the State party acknowledges that this occurred. While it is true, as asserted by the State party, that acts of terrorism at the time of the events were already offences under Legislative Decree No. 46 of March 1981, it is equally true that Act No. 24651 of 1987 amended the penalties, by imposing higher minimum sentences and thereby making the situation of guilty parties worse.[6] Although Mr. Gómez Casafranca was sentenced to the minimum term of 25 years under the new law, this was more than double compared to the minimum term under the previous law, and the Court gave no explanation as to what would have been the sentence under the old law if still applicable. Accordingly, the Committee finds that there was a violation of article 15 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee constitute violations of articles 7; 9, paragraphs 1 and 3; 14 and 15 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to release Mr. Gómez Casafranca and pay him appropriate compensation. The State party is also under an obligation to ensure that similar violations do not occur in future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 90 days, information on the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the original text being the Spanish version. To be published subsequently in Arabic, Chinese and Russian too, as part of the present report.]

Notes

[1] Department of Counter-Terrorism.

[2] Sandro Galdo Arrieta, Francisco Reyna García, Ignacio Guizado Talaverano and Rosa Luz Tineo Suasnabar.

[3] Act No. 26655 was passed to give pardons to individuals convicted of terrorism, and it is administered by the National Council of Human Rights of Peru. There is no information about any decision taken in relation to Mr. Gómez Casafranca.

[4] Act No. 26248 of 25 November 1993, which re-established the habeas corpus in cases of terrorism and treason.

[5] Act No. 26671 of 12 October 1996, which established that "faceless" judges will no longer function from 15 October 1997.

[6] Legislative Decree No. 46 of March 1981 sets the minimum penalty at 12 years' imprisonment and sets no maximum penalty. Act No. 24651 of 1987 sets the minimum penalty at 25 years' imprisonment and the maximum at life imprisonment, but only for leaders of terrorist organizations.

Y. Communication No. 983/2001, *Love et al. v. Australia**
(Views adopted on 25 March 2003, seventy-seventh session)

Submitted by:	John K. Love, William L. Bone, William J. Craig, and Peter B. Ivanoff (represented by counsel, Kathryn Fawcett)
Alleged victim:	The authors
State party:	Australia
Date of communication:	1 August 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 2003,

Having concluded its consideration of communication No. 983/2001, submitted to the Human Rights Committee by John K. Love, William L. Bone, William J. Craig and Peter B. Ivanoff under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are William L. Bone, William J. Craig, Peter B. Ivanoff and John K. Love, all Australian citizens, who claim to be victims of a violation by Australia of articles 2, paragraphs 2 and 3, and 26 of the International Covenant on Civil and Political Rights. The authors are represented by counsel. The Optional Protocol to the International Covenant on Civil and Political Rights entered into force for Australia on 25 December 1991.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden. Under rule 85 of the Committee's rules of procedure, Mr. Ivan Shearer did not participate in the examination of the case.

The texts of two individual opinions signed by Committee members Mr. Nisuke Ando and Mr. Prafullachandra Natwarlal Bhagwati are appended to the present document.

The facts as presented

2.1 On 27 October 1989, 24 November 1989, 10 January 1990 and 24 March 1990, respectively, Messrs. Ivanoff, Love, Bone and Craig, all experienced pilots, commenced contracts as pilots on domestic aircraft operated by Australian Airlines, now part of Qantas Airlines Limited. Australian Airlines was wholly State-owned and operated by Government-appointed management. The airline terminated the authors' contracts upon their reaching 60 years of age pursuant to a compulsory age-based retirement policy. The respective dates of the authors' compulsory retirement were the day before they reached 60 years of age, that is, for Mr. Craig, 29 August 1990; for Mr. Ivanoff, 18 September 1990; for Mr. Bone, 12 October 1991; and, for Mr. Love, on 17 May 1992. The contracts under which they were employed did not include a specific clause to provide for compulsory retirement at that or any other age. Each of the authors held valid pilot licences, as well as medical certificates, at the time of the terminations. Following the termination, Mr. Ivanoff was engaged by another airline company as a B727 captain and in 1997 was working as a B737 simulator instructor.[1]

2.2 From 25 December 1991 onwards, the airline refused the authors' requests for re-employment negotiations. On 12 June 1992, the four authors submitted a complaint to the Australian Human Rights and Equal Opportunities Commission (HREOC) claiming that they had been discriminated against on the basis of their age. The investigation of the complaints was drawn out, according to the authors, due to the airline's refusal to take part in negotiation or conciliation, and, possibly, contentious medical evidence. Following the takeover in 1993 of Australian Airlines by the Government-owned Qantas, Qantas was entirely sold to private ownership in a transaction completed on 31 July 1995.

2.3 On 30 March 1994, the federal Industrial Relations Act 1988 was amended to make it unlawful to terminate a person's employment on the grounds of his or her age. Following that amendment, a Mr. Allman, also a pilot employed by Australian Airlines, lost his job upon reaching 60 years of age. He took an action against the company and, on 18 March 1995, the Industrial Relations Court found in his favour. Mr. Allman was re-employed as a result. Since that date, Quantas (having taken over Australian Airlines) ceased to impose a retirement age on its domestic pilots.

2.4 On 14 August 1995, the (then) Human Rights Commissioner, who performs HREOC's function of inquiring into any act or practice that may constitute discrimination, reviewed the findings of previous Commissioners who had concluded that mandatory retirement was discriminatory and formed the same opinion. On 9 November 1995, the Commissioner convened an inquiry into the authors' dismissals, taking submissions from Qantas (the respondent) and the authors. On 12 April 1996, the Commissioner decided that the compulsory retirement of the authors upon reaching the age of 60 constituted discrimination in employment based on age. It rejected the argument that the age limit of 60 was per se required to ensure the safety of flight operations. The Commissioner made the following recommendations to Qantas: (1) the airline should discontinue the practice of compulsorily retiring its employees on the sole basis that they reach 60 years of age; (2) that the airline should pay the authors compensation for loss of earnings suffered as a result of the discriminatory conduct; (3) that the airline should make the necessary arrangements for Mr. Ivanoff to undertake the Qantas "over 60" medical tests and, if these and other requirements of the Civil Aviation Authority were satisfied, to re-employ Mr. Ivanoff and where necessary retrain him as a pilot to fly equivalent aircraft or aircraft as near to equivalent as possible to those he was flying prior to his compulsory retirement. More generally, it recommended to the federal Government to institute a comprehensive national ban on age discrimination, including a removal of the mandatory retirement provisions in the Public Service Act 1922 and other federal legislation.

2.5 Qantas, now in private hands, refused to accept the findings of the Commissioner and rejected its recommendation to pay compensation. On 10 May 1996, its legal advisers responded to HREOC that it had generally discontinued the practice of compulsory retirement at 60; however, it considered that it was not appropriate to accept the recommendations for re-employment or compensation made by HREOC in the specific case. It noted that its policy, which had been based primarily on air safety, was lawful, and had not been rendered unlawful by the legislation empowering HREOC to make recommendations. It recalled that it had made plain during the HREOC hearings that it would not be inclined to accept recommendations for re-employment or compensation.

The complaint

3. The authors allege that Australia has violated their rights to non-discrimination on the basis of age under article 26, through failing to protect them from terminations in the workplace made on this proscribed ground. They also allege a violation of article 26's protection against age discrimination in the refusal of Australian Airlines to engage in, and the failure of the State to facilitate, from 25 December 1991, re-employment negotiations concerning Mr. Ivanoff. Moreover, the authors argue that, where violations have occurred, the State party is under an obligation to comply with the recommendations for redress of its own human rights commission. In response to the State party's submission, the authors further add a violation of article 2 in that the State party has failed to provide an effective remedy for a violation of a Covenant right.[2]

The State party's submissions on admissibility and merits

4.1 By submission of 3 January 2002, the State party responded, disputing both the admissibility and the merits of the communication.

4.2 As to the complaint of principle that the State party has failed to implement HREOC's recommendations, the State party regards this complaint in its entirety as falling *ratione materiae* outside the Covenant, for nothing in article 26 of the Covenant requires any such thing.

4.3 Turning to the specific recommendations of HREOC (i) to repeal compulsory retirement provisions in the Public Service Act 1922 and other federal legislation, and (ii) to legislate a comprehensive national prohibition on age discrimination, the State party further argues that the allegation is inadmissible *ratione personae* as the victims are not victims of an alleged failure to take either of these steps. As to (i), the authors were not employed under the Public Service Act 1922 and so any alteration to, or failure to alter, that Act would not have affected them. As to (ii), the authors have not demonstrated how they were affected by the absence of a comprehensive ban on age discrimination. There is no indication such a legislative framework would have affected the dismissal decisions. Nor is there any evidence of post-dismissal discrimination, or how that would have been prevented by the framework in question.

4.4 As to the merits of these allegations, the State party states, as to (i), that the Public Service Act 1999 removed compulsory age retirement for Commonwealth public servants. As to (ii), the State party notes that new legislation, designed to change old social conditions, cannot be translated into reality from one day to another.[3] When making changes to legislative frameworks, it is appropriate that States be given time to make the changes in line with their democratic and constitutional processes. Currently, the State party has decided to implement one of the main recommendations of HREOC's "Age Matters" report (2000), by developing a Federal Age Discrimination Act, prohibiting age discrimination, in consultation with business and community groups. Drafting is in progress. The State party has also abolished compulsory age retirement in some areas of Commonwealth responsibility: Public Service Act 1999 and Abolition of Compulsory Age Retirement (Statutory Officeholders) Act 2001, and it intends to abolish compulsory retirement for directors of public companies. In 1996, the Workplace Relations Act 1996 (superseding the Industrial Relations Act) prohibited termination of employment on the basis of age. In States and Territories, discrimination is unlawful in areas of employment, education and training, accommodation, goods and services and clubs. Accordingly, the State party argues it is taking gradual steps, in fact, to eliminate age discrimination.

4.5 As to the complaint that (i) the dismissals from Australian Airlines violated article 26, as did (ii) the State's failure to protect them against that, the State party argues that the claim is inadmissible *ratione temporis* in relation to Messrs. Bone, Craig and Ivanoff. These three authors were dismissed prior to the entry into force of the Optional Protocol. Nor have they argued that there are any continuing effects which, in themselves, constitute a violation of the Covenant. The State party submits that the consequence of the dismissals - no longer being employed - did not of itself constitute a violation of the Covenant, for the dismissals were one-off events. Any argument of continuing effects based on a refusal to re-employ the authors would, properly conceived, be a fresh and separate act of discrimination (if at all).

4.6 Moreover, the State party argues as to (i) that as the dismissals were carried out by an incorporated company, rather than the Government, the allegation does not relate to a State party, as required by article 1 of the Optional Protocol. The State party refers to the Committee's jurisprudence finding communications directed against non-State entities inadmissible.[4] The State party argues that its responsibility for the acts of an incorporated company depends on its links with it. Where an entity is not part of the formal structure of the State, its acts may still constitute acts of the State where internal law empowers the entity to exercise elements of governmental authority.[5] In this case, while the State party owned all shares in Australian Airlines, a Commonwealth Government Business Enterprise (CGBE), at the time of the dismissals, the Government did not intervene in day-to-day administration.

4.7 The State party explains that its relationship with the airline was governed by a mix of legislation covering its general governance arrangements and policy with all CGBEs. In 1988, policy changes enhanced the airline's autonomy and gave it greater flexibility, with government control being minimized. Following the Australian Airlines (Conversion to a Public Company) Act 1988, day-to-day controls were removed from the public service, leaving more operations subject to commercial management decisions under a board with increased responsibilities. As such, employment matters were for the airline management, under direction of its board and within broad government guidelines. As an incorporated company, it acted at its own discretion and was not exercising government powers. Accordingly, if there was any discrimination (which is denied), Australian Airlines rather than the State party is responsible for it.

4.8 As to the merits of this allegation, the State party submits that the dismissals were based on reasonable and objective criteria, did not violate article 26 and accordingly the authors required no protection against such action. The State party refers to the Committee's jurisprudence that distinctions are not discrimination if based on reasonable and objective grounds and aimed at a legitimate purpose. The State party submits that, as a matter of logic and fairness, this determination should be made on the basis of the information available at the time the act took place. Thus, a distinction that was reasonable and objective on the medical information available to the airline at the time is not discounted by the emergence of subsequent contrary practice.

4.9 The State party points out that the Committee's test differs from that applied by HREOC and in the Australian courts, that is, the "inherent requirement" of the position test justifying an age distinction.[6] Therefore the decisions of these local bodies denying that a particular age was an inherent medical requirement are not determinative of the broader question of whether the dismissals were objectively and reasonably justified.

4.10 Turning to the particular case, the State party argues the dismissals were justified, reflecting an internationally-accepted standard, based on medical studies and evidence, and enacted in order to ensure the greatest possible safety to passengers and others affected by air travel (a purpose legitimate under the Covenant). Before HREOC, Qantas has argued that mandatory retirement was necessary to minimize to the lowest extent possible risk to the safety of passengers, crew and the wider public; while any age limit was arbitrary, as some fit pilots would be forced to retire, a limit of 60 struck a fair balance between pilots wishing to prolong careers and public safety. Similarly, the decision of the Chief Pilot of Australian Airlines to impose a mandatory retirement was based on universally-applied and long-established custom of the Australian airline industry and the inherent requirements of the job.

4.11 The State party argues that the decision was informed by medical studies and evidence from various published scientific papers on the subject.[7] In the *Christie* court proceedings, expert evidence had also considered the age restriction "prudent and necessary" and justified by the medical and operational data. Although HREOC accepted the court's finding in *Christie* that "none of the cited studies supports any conclusion between [mandatory retirement] and aircraft safety", the State party submits that this is not determinative for the wider question of reasonable and objective criteria. Rather, the medical studies and data available at the time of the dismissals were adequate to give rise to a belief that mandatory retirement was necessary for safety and that the dismissals were objective and reasonable.

4.12 Moreover, the mandatory retirement policy was instituted with consideration to the international safety standards set by the International Civil Aviation Organization (ICAO), which are intended to be mandatory and are followed by many States as best practice. It is expected that States conform to "standards" and endeavour to conform with "recommended practices". The Convention on International Civil Aviation provides a standard that 60 is the limit for a pilot-in-command of international flights, and a recommended practice that 60 be the limit for co-pilots. One hundred and sixty-two States out of 186, have *not* notified the ICAO of a failure to conform with the standard. From these figures, the State party extrapolates a widely-accepted international safety standard pointing to reasonableness and objectivity of the dismissals.

4.13 In 1992, the State party modified its Civil Aviation Regulations enabling commercial passenger pilots aged 60-65, and aged over 65, to fly if, inter alia, they had completed an aeroplane proficiency check/flight review within a year or six months, respectively, of the flight. On 3 March 2000, the State party made notifications to the ICAO of non-compliance on the standard and the recommended practice. Thus, the State party permits pilots over 60 to fly, while recognizing that there are safety concerns requiring precautionary measures. While it no longer accepts that mandatory retirement at 60 is per se necessary to ensure safety, at the time of the dismissals it was reasonable and objective for a mandatory retirement to be based on this consideration, for at that time the medical evidence indicated risks arising solely after reaching age 60. It follows that the distinction was not contrary to article 26, and that the State party was not obliged to protect the authors against the application of that distinction.

4.14 As to the allegation that the refusal to enter re-employment negotiations constituted age discrimination, the State party again argues that any such refusal was taken by Australian Airlines, for which it was not responsible. Moreover, the allegation has not been substantiated, for the authors have provided no information relating to these alleged refusals, nor have they explained why the alleged refusals amounted to age discrimination. On these two bases, then, this allegation also is inadmissible.

The authors' comments

5.1 By submissions of 14 March 2002, the authors reject the State party's submissions.

5.2 At the outset, they clarify that they make no allegation with respect to the Public Service Act 1922.

5.3 As to the first allegation (that the State party failed to legislate a comprehensive age discrimination ban, contrary to HREOC's recommendation), the authors expand on their claim. They argue that this failure itself constitutes a breach of the Covenant. Moreover, since a primary statutory purpose of HREOC is to protect Covenant rights, a failure to give effect to its recommendations when it identifies violations of those rights breaches the State party's obligations under articles 2, paragraphs 2 and 3, and 26 of the Covenant. In the alternative, and at a minimum, the failure to implement HREOC recommendations should be seen as evidence of a violation.

5.4 As to the admissibility of this first claim, the authors cite the "actually affected" test of standing adopted in the *Mauritian Women*[8] case, contending that they do not make abstract allegations but rather satisfy this condition in the following ways: (i) at the time of the dismissals, there was no legislation in place rendering that policy illegal, and/or (ii) when legal action began on 12 June 1992, there was no legislation in place enabling an effective challenge to the dismissal, and/or (iii) at the time HREOC issued its recommendations, there was no legislation in place allowing enforcement thereof, and/or (iv), in Mr. Ivanoff's case, there was no provision to gain redress for the failure to re-employ him at that point.

5.5 As to the merits of this first claim, the authors invite the Committee to reject the State party's submissions of step-by-step implementation, over time, of HREOC's recommendations. They argue that while the Government has received recommendations concerning a comprehensive, enforceable age discrimination over the years, it has provided no details as to the progress in drafting an "Age Discrimination Bill", nor of its contents, nor whether and when it may enter into force. This, so argue the authors, distinguishes the case from the situation in *Pauger v. Austria*[9] where information on the time frame and implementation of remedial legislation had been provided. If the Committee accepts that the State party is taking appropriate measures, the authors note that in *Pauger* the Committee regarded the State party implicitly acknowledging that the complaint had been made out. Similarly here, according to the authors, the State party had not denied that its failure to implement a comprehensive ban on age discrimination violated the Covenant. Rather, by outlining the steps being taken to redress the breach, they are acknowledging the breach is made out. Additionally, the Committee in *Pauger* was of the view that the State party should offer the victim an appropriate remedy despite the steps being taken, and the authors invite the Committee to take the same approach.

5.6 As to the second claim (that the State party allowed the authors' dismissal from Australian Airlines on discriminatory grounds in contravention of its obligations under article 26), (i) the authors reject the State party's arguments as to admissibility. As to the arguments of inadmissibility *ratione temporis* for the three authors dismissed prior to the entry into force of the Optional Protocol on 25 December 1991 ("the relevant date"), they argue that these acts of discrimination continued, or had continuing effects, after that date in several ways. These were (a) that they were prevented from working at their former employer, subsequent to the relevant date, due to the compulsory retirement policy, (b) that they lodged complaints to HREOC after the relevant date, (c) that findings in their favour were made by HREOC after the relevant date, and (d) that their former employer, after the relevant date, failed to implement HREOC's findings, and, in Mr. Ivanoff's case, failed to re-employ him.

5.7 The authors also reject the State party's argument of inadmissibility *ratione personae*, which contended that, as Australian Airlines was an incorporated company and Commonwealth Government Business Enterprise at the time of the dismissals, subject to "the normal provisions relating to control, performance, accountability and performance of company activities", there was no violation by a State party. The authors argue that, while some steps had been taken to create a level of independence for the airline, its incorporation occurred pursuant to statute, and all shares were held by the State party's Government. They submit that the Government was ultimately responsible for management decisions in its sole shareholder capacity, and accordingly is directly responsible for the discriminatory dismissals. In addition, the State party was responsible for the dismissals, as well as the subsequent effects, by failing to have legislation in place to prevent age discrimination.

5.8 As to the merits of the second claim, the authors argue that the dismissals were not based upon reasonable and objective grounds and thus violated article 26. They submit that the proper test is whether, at the time of the dismissals, the age distinction made was objective, reasonable and legitimate for a purpose under the Covenant. The authors submit that test is not materially different from that applied by HREOC and the Australian courts,[10] which evaluated whether it was an "inherent requirement" of the job that an airline pilot be under 60 and found this was not the case. The authors submit that HREOC, in rejecting the submissions advanced by Australian Airlines, implicitly found that the age distinction was neither reasonable nor objective, and that therefore the Committee need not re-examine that question ab initio.

5.9 The authors emphasize that a number of the considerations now advanced by the State party in favour of the proposition that the age distinction was objective and reasonable were considered by HREOC in its conclusions. These included (a) that the compulsory retirement age was based on an internationally accepted standard, (b) that medical evidence supported the policy, (c) that the policy ensured the greatest possible air passenger safety, (d) that the Australian Airlines Chief Pilot imposed the mandatory retirement age because of long-standing industry practice. The authors note that the State party has not implemented the international standards upon which they seek to rely in justifying the compulsory retirement policy. Indeed, the State party concedes that it no longer recognizes a mandatory retirement age of 60 as being of itself necessary to ensure safety. The authors go further to argue that on an objective and reasonable view, it had indeed never been necessary.

5.10 As to the State party's argument that the relevant test should be what Australian Airlines *believed* to be reasonable at the time of the dismissals, the authors note that this kind of "subjective" test was rejected by HREOC. The authors contend that the test of the justification for the distinction must be objective, for otherwise a State party could simply assert its belief that a differentiation was reasonable in order to avoid a finding of breach of the Covenant.

The authors add that the State party had not demonstrated how the distinction in the case had the aim of achieving "a purpose which is legitimate under the Covenant", that being an extra element of the "objective and reasonable" test which had to be satisfied.

5.11 In any event, the authors submit that HREOC's decision was in accordance with international interpretation of Discrimination (Employment and Occupation) Convention 111 of the International Labour Organization (ILO).[11] The ILO's Committee of Experts has commented that an "inherent requirement" of an age distinction for a particular job must be proportionate to the aim being pursued and must be necessary because of the very nature of the job in question. The authors submit that the views of the Committee of Experts should be taken into account to assess the "objective and reasonable" criterion under article 26.

5.12 In sum, the authors invite the Committee to conclude that the distinction was not based upon objective and reasonable grounds, to accept HREOC's findings, or, if it wished to reconsider all the evidence in the matter, to invite the authors to supply further evidence.

5.13 As to the third claim (that the State party, in violation of the Covenant, failed to facilitate Mr. Ivanoff's attempt to be re-employed), the authors reject the State party's arguments of inadmissibility. Regarding substantiation, it considers that the letter of airline counsel to HREOC dated 10 May 1996 substantiates the claim, for it makes clear that Qantas would not re-employ Mr. Ivanoff as its policy was based on air safety and was not unlawful. As to the argument that there was no violation by a State party, the authors repeat their arguments above on this point.[12]

Supplementary submissions by the State party

6.1 By further submissions of 13 May 2002, the State party responded to the authors' comments, reiterating its earlier submissions and making certain further comments.

6.2 As to the allegation that a failure to create a comprehensive prohibition on age discrimination of itself violates article 26 (as distinct from the allegation related to implementing HREOC's recommendations), the State party contends that as the authors' dismissals were based on reasonable and objective criteria and, therefore, were not discriminatory, then there was nothing for the law to prohibit. Accordingly, a failure to implement a comprehensive prohibition on age discrimination did not violate article 26 insofar as the authors' case is concerned.

6.3 The State party rejects counsel's contention that it has implicitly admitted, by outlining the remedial steps being taken, that the alleged refusal to implement a legislative framework violated article 26. It reiterates that the authors cannot contend that an absence of legislation affected them in the abstract in the absence of some act of discrimination committed against them.

6.4 The State party rejects that age discrimination legislation that it has described in progress is in response to HREOC's findings in the authors' case. Rather it is in response to the recommendations made entirely separately in HREOC's "Age Matters Report" of June 2000, that the Government is incidentally implementing the recommendation to create a comprehensive prohibition on age discrimination. The State party emphasizes that it is not creating a comprehensive legislative prohibition on age discrimination because it considers itself to be in violation of the Covenant, but rather to ensure that there is a balance between the need to eliminate unfair discrimination on the basis of age and the need to ensure sufficient flexibility to allow for situations where age requirements have particular significance.

6.5 Responding to counsel's interpretation of *Pauger v. Austria*,[13] the State party argues that as there has been no violation of the Covenant, there is no reason for the authors to receive a remedy. In response to counsel's comment that (unlike *Pauger*) insufficient information on the progress of the proposed legislative prohibition on age discrimination has been provided, the State party argues that it is not necessary to do so, as there has not been any violation of the Covenant. However, to assist the Committee, it states that the Government has begun the process of developing age discrimination legislation. The Government is consulting with business and with community organizations representing older persons, children and youth before making informed and balanced decisions about the specific content of the Bill. Initial work has been done in identifying the central issues and questions that arise as to content of an Age Discrimination Bill, and it is likely that the Bill will cover age discrimination in a range of areas of public life, such as employment; education and access to goods, services and facilities. The Bill will be introduced during the term of the current Government.

6.6 As to the contention that a failure to implement HREOC's recommendations violates article 2 (in addition to 26), the State party notes that this is a new allegation arising at a late stage of the communication process, and asks the Committee to consider whether it is appropriate for the Committee to accept allegations not included in the authors' original communication. In particular, the Committee is asked to note that the new allegation is not related to new evidence or events and therefore there is no reason why the authors could not have raised it in their original communication. In any event, the Committee's constant jurisprudence is that article 2 is an accessory right that cannot be invoked independently of another right. As there has been no violation of article 26 in this case, there cannot have been a violation of article 2.

6.7 As to the temporal aspect of the alleged violations, the State party rejects that there were any continuing effects (for Craig, Ivanoff and Bone) which *themselves* constituted a violation of the Covenant.[14] Specifically, in response to the continuing effects advanced by the authors, the State party notes that the authors' dismissals were one-off events. If there was any violation of the Covenant, it occurred at the time of dismissal. The fact that the authors were not able to work for their former employer after the date of dismissal is not itself a violation of the Covenant. Further, having the right to lodge a complaint (to HREOC), and doing so, is not of itself a violation of the Covenant, and having received findings in one's favour (by HREOC) is not of itself a violation of the Covenant. Finally, as a refusal to implement the recommendations of a domestic human rights body is not a violation of the Covenant, such a refusal cannot be a continuing effect as it cannot of itself be a violation of the Covenant.

6.8 The State party argues that there is no evidence to support counsel"s contention that HREOC formed the implicit conclusion that the distinction made by Australian Airlines was neither objective nor reasonable. It goes on to argue that, even if there were such evidence, "the Committee must make its own determination of whether or not the authors' dismissals were objective and reasonable. The Committee, not [HREOC], is the body empowered by the Covenant to 'receive and consider communications'. It would be inappropriate for the Committee to subordinate its decision-making power to a national body when the States parties have consented that the Committee would be exercising its decision-making power independent of the determinations of national bodies".

6.9 As to counsel's submissions on subjective/objective nature of the test to be applied, the State party states that, while it referred to "belief" in its submissions, it did not intend to submit that the Committee should consider whether the dismissals were reasonable and objective based on the belief of the decision maker. Rather, it intended to ask the Committee to consider whether the dismissals were based on reasonable and objective criteria. It further submits that whether or not the criteria were reasonable and objective is to be determined by reference to the information available to the decision maker at the time at which the dismissals occurred.

6.10 The State party argues that Australian Airlines based its decision to dismiss the authors on objective and reasonable criteria then available to it, derived from internationally accepted standards, medical studies and evidence, and concerns for passenger safety. As to counsel's comment that it had not demonstrated how the distinction in the authors' circumstances has the aim of achieving "a purpose which is legitimate under the Covenant", it refers to its submissions stating that a measure enacted in order to ensure the greatest possible safety to passengers and other persons affected by air travel is a purpose legitimate under the Covenant. Plainly, such a purpose falls under article 6 and is not contrary to the Covenant.

6.11 As to counsel's argument that HREOC's approach was consistent with the interpretation of ILO Convention 111 and should be respected by the Committee, the State party submits that the interpretation of ILO Convention 111 is not relevant to, nor determinative of, the case before the Committee under the Covenant.

6.12 In response to the authors' comments that the "inherent requirement" test, applied inter alia by the ILO Committee of Experts, is essentially analogous to the "objective and reasonable" test, the State party argues that there are significant differences, for asking whether or not a requirement is necessary differs from asking whether or not a requirement is objective and reasonable. A requirement may not be necessary in an absolute sense but it may still be objective and reasonable given the probabilities involved. The State party requests the Committee to follow its jurisprudence and apply the objective and reasonable test, rather than an inherent requirement/necessity test.

6.13 In response to the authors' comments that the State party has not implemented the international standards upon which it relies for the justification of the compulsory age retirement policy, the State party notes that while the ICAO standard referred to is not directly implemented in its law, it does conform with the standard where an Australian airline flies into or out of a country that complies with the standard.

6.14 In response to the authors' request to the Committee to supply further submissions if it decides to reconsider all the evidence in respect of this matter in order to make a determination pursuant to the objective and reasonable test, the State party asks the Committee to note that the authors are aware that the Committee may proceed to a determination pursuant to the objective and reasonable test. It asks, therefore, why the authors have not presented available evidence in support of their submissions at this point, rather than delay consideration of the communication in piecemeal fashion. The State party is satisfied that the matter is ready for consideration now, but requests the opportunity to respond if the Committee asks the authors for further evidence.

6.15 As to the allegation on the refusal to enter into re-employment negotiations, the State party maintains that no evidence has been presented indicating that the decisions not to enter re-employment negotiations, or to re-hire Mr. Ivanoff, were made on any other basis than that of legal considerations. Accordingly, the allegation is not substantiated and inadmissible.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol. The Committee further notes that the State party has not advanced any argument that there remain domestic remedies to be exhausted, and thus is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from considering the communication.

7.3 As to the State party's arguments that the claims of three of the four authors (Messrs. Bone, Craig and Ivanoff) are barred *ratione temporis*, the Committee considers that the acts of alleged discrimination, properly understood, occurred and were complete at the time of the dismissals. The Committee does not consider that the continuing effects in this case of these acts could *themselves* amount to violations of the Covenant, nor that subsequent refusals to take up re-employment negotiations could appropriately be understood as fresh acts of discrimination independent of the original dismissal. It follows that the claims of these three authors are inadmissible *ratione temporis*. The claim by Mr. Love, however, being based on his dismissal after the entry into force of the Optional Protocol, is not inadmissible for this reason.

7.4 The Committee notes the State party's additional arguments on admissibility to the effect that Mr. Love's dismissal was, in truth, an act purely of Australian Airlines and was not, under rules of attribution of State responsibility, imputable to the State party, and further that Mr. Love cannot be regarded as a victim, in terms of the Optional Protocol, of an *absence* of an age discrimination ban. The Committee considers that, in the light of the need for a close examination and assessment of the particular facts and law relevant to these issues, it is appropriate to address these arguments at the merits stage, for they are intimately bound up with the assessment of the scope of the State party's obligation under article 26 of the Covenant to respect and ensure the equal protection of the law against discriminatory dismissal.

7.5 As to the claim relating to a direct obligation under the Covenant to implement the findings of domestic human rights bodies (such as HREOC), which are non-binding under domestic law, the Committee considers that, while it will pay due consideration to the determinations of such bodies which have in whole or on part relied on provisions of the Covenant, in the ultimate analysis it must be for the Committee to interpret the Covenant in the manner it considers correct and appropriate. The Committee agrees with the State party's position that States parties have ratified the Optional Protocol on the understanding that it will be for the Committee to exercise its decision-making power on the interpretation of the Covenant independently of the determination by any national bodies. It follows that an obligation per se under the Covenant to implement non-binding findings of such non-judicial bodies is incompatible *ratione materiae* with the Covenant, and this particular claim is inadmissible under article 3 of the Optional Protocol.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

8.2 The issue to be decided by the Committee on the merits is whether the author(s) have been subject to discrimination, contrary to article 26 of the Covenant. The Committee recalls its constant jurisprudence that not every distinction constitutes discrimination, in violation of article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant. While age as such is not mentioned as one of the enumerated grounds of prohibited discrimination in the second sentence of article 26, the Committee takes the view that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of "other status" under the clause in question, or to a denial of the equal protection of the law within the meaning of the first sentence of article 26. However, it is by no means clear that mandatory retirement age would generally constitute age discrimination. The Committee takes note of the fact that systems of mandatory retirement age may include a dimension of workers' protection by limiting the lifelong working time, in particular when there are comprehensive social security schemes that secure the subsistence of persons who have reached such an age. Furthermore, reasons related to employment policy may be behind legislation or policy on mandatory retirement age. The Committee notes that while the International Labour Organization has built up an elaborate regime of protection against discrimination in employment, mandatory retirement age does not appear to be prohibited in any of the ILO Conventions. These considerations will of course not absolve the Committee's task of assessing under article 26 of the Covenant whether any particular arrangement for mandatory retirement age is discriminatory.

8.3 In the present case, as the State party notes, the aim of maximizing safety to passengers, crew and persons otherwise affected by flight travel was a legitimate aim under the Covenant. As to the reasonable and objective nature of the distinction made on the basis of age, the Committee takes into account the widespread national and international practice, at the time of the author's dismissals, of imposing a mandatory retirement age of 60. In order to justify the practice of dismissals maintained at the relevant time, the State party has referred to the ICAO regime which was aimed at, and understood as, maximizing flight safety. In the circumstances, the Committee cannot conclude that the distinction made was not, at the time of Mr. Love's dismissal, based on objective and reasonable considerations. Consequently, the Committee is of the view that it cannot establish a violation of article 26.

8.4 In the light of the above finding that Mr. Love did not suffer discrimination in violation of article 26, it is unnecessary to decide whether the dismissal was directly imputable to the State party, or whether the State party's responsibility would be engaged by a failure to prevent third party discrimination.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 26 of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] No information is provided on what, if any, further professional employment the remaining authors undertook.

[2] See, *infra*, paragraph 5.3.

[3] The State party refers to the similar submissions made by the State party in *Pauger v. Austria*, Case No. 415/1990, Views adopted on 26 March 1992.

[4] *F.G.G. v. The Netherlands*, Case No. 209/1986, Decision adopted 25 March 1987, and *BdB v. The Netherlands*, Case No. 273/1989, Decision adopted 30 March 1989.

[5] Shaw, M.: *International Law* (4th ed.) (1997), pp. 548-549; Brownlie, I.: *Principles of Public International Law* (5th ed.), p. 449.

[6] *J.B. Christie v. Qantas Airways Ltd.* (1995) AILR 38; *Qantas Airways Ltd. v. Christie* (1998) 193 CLR 280.

[7] The studies referred to by the State party (Kulak et al., "Epidemiological Study of In-flight Airline Pilot Incapacitation" (1971); Booze, "An Epidemiological Investigation of Occupation, Age and Exposure in General Aviation Accidents" (1977); National Institutes of Health, "Report of the National Institute on Aging Panel on the Experienced Pilots Study" (1981); Golaszewski, "The Influence of Total Flight Time, Recent Flight Time and Age on Pilot Accident Rates" (1983); and Office of Technology Assessment of the United States Congress, "Medical Risk Assessment and the Age 60 Rule for Airline Pilots" (1990)) are summarized in the HREOC report.

[8] *Aumeeruddy-Cziffra et al. v. Mauritius*, Case No. 35/1978, Views adopted on 9 April 1981.

[9] Op. cit.

[10] *Christie v. Qantas Airways Ltd.* (1995) AILR 1,623 (3-134).

[11] Article 1, paragraph 2, of the Convention provides that "Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."

[12] Supra, at paragraph 5.7.

[13] Op. cit.

[14] *M.A. v. Italy*, Case No. 117/1981, Decision adopted on 10 April 1984.

APPENDIX

Individual opinion of Committee member Mr. Nisuke Ando (concurring in the result)

I share the conclusion of the majority Views that the imposition of a mandatory retirement age of 60 is not a violation of article 26. However, I am unable to agree to the Views' statement that "a distinction related to age … may amount to discrimination on the ground of 'other status' under the clause in question, or to a denial of the equal protection of the law within the meaning of the first sentence of article 26" (para. 8.2) for the following reasons:

Firstly, I consider that "age" should not be included in "other status" because age has a distinctive character which is different from all the grounds enumerated in article 26. All the grounds enumerated in article 26 are applicable only to a portion of the human species, however large it may be. In contrast, age is applicable to all the human species, and because of this unique character, age constitutes ground to treat a portion of persons differently from others in the whole scheme of the Covenant. For example, article 6, paragraph 5, prohibits the imposition of death sentence on "persons below 18 years of age", and article 23, paragraph 2, speaks of "men and women of marriageable age". In addition, terms such as "every child" (art. 24) and "every citizen" (art. 25) presuppose a certain age as a legitimate ground to differentiate persons. In my opinion, "other status" referred to in article 26 should be interpreted to share the characteristic which is common to all the grounds enumerated in that article, thus precluding age. Of course, this does not deny that differentiation based on "age" may raise issues under article 26, but the term "such as" which precedes the enumeration implies that there is no need to include "age" in "other status".

Secondly, I doubt if the issue in the present case is "a denial of the equal protection of the law within the meaning of the first sentence of article 26". In essence, the authors of the present case are claiming that "professional qualifications" to be a pilot should be judged on the basis of each individual's physical and other capacities (abilities), that the imposition of a mandatory retirement age ignores this basis, and that such imposition constitutes discrimination based on age which is prohibited under article 26. This is tantamount to claiming that different treatment of persons of the same age with different capacities violates the principle of equal protection of the law. However, a professional qualification usually requires a minimum age, while a person below that age may well have sufficient capacities to qualify for the profession. In other words, a professional qualification usually requires a certain minimum age as well as maximum age, and such age requirements have little to do with the principle of equal protection of the law.

Thirdly, in my opinion, the present case concerns "the right to work" and its "legitimate limitations" under the International Covenant on Economic, Social and Cultural Rights (art. 6, para. 1, and art. 4, respectively). Thus, at issue here is a proper balance between an economic or social right and its limitations. Of course, article 26 of the International Covenant on Civil and Political Rights prohibits discrimination in law or in fact in any field regulated and protected by public authorities, thus applying to economic or social rights as well. Nevertheless, as in the present case, the limitations of certain economic or social rights, in particular the right to work or to pension or to social security, require thorough scrutiny of various economic and social factors, of which the State party concerned is ordinarily in the best position to make objective and reasonable evaluation and adjustment. This means that the Human Rights Committee should respect the limitations of those rights set by the State party concerned unless they involve clearly unfair procedural irregularities or entail manifestly inequitable results.

(*Signed*): Nisuke Ando

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Mr. Prafullachandra Natwarlal Bhagwati (concurring in the result)

The question is whether imposing a mandatory age of retirement at 60 for airline pilots could be said to be a violation of article 26 of the Covenant. Article 26 does not say in explicit terms that no one shall be subjected to discrimination on ground of age. The prohibited grounds of discrimination are set out in article 26, but age is not one of them. Article 26 has therefore no application in the present case, so runs an argument that could be made.

This argument, plausible though it may seem, is in my opinion not acceptable. There are two very good reasons why I take this view.

In the first place, article 26 embodies the guarantee of equality before the law and non-discrimination. This is a guarantee against arbitrariness in State action. Equality is antithetical to arbitrariness. Article 26 is therefore intended to strike against arbitrariness in State action. Now, fixing the age of retirement at 60 for airline pilots cannot be said to be arbitrary. It is not as if a date has been arbitrarily picked out by the State party for retirement of airline pilots. It is not uncommon to find that in many countries 60 years is the age fixed for superannuation of airline pilots, since that is the age at which it would not be unreasonable to expect airline pilots would be affected, particularly since they have to fly airplanes which require considerable alacrity, alertness, concentration and presence of mind. I do not think that the selection of the age of 60 years for mandatory retirement for airline pilots can be said to be arbitrary or unreasonable so as to constitute a violation of article 26.

In the second place, the words "such as" preceding the enumeration of the grounds in article 26 clearly indicate that the grounds there enumerated are illustrative and not exhaustive. Age as a prohibited ground of discrimination is therefore not excluded. Secondly, the word "status" can be interpreted so as to include age. It is therefore a valid argument that if there was discrimination on the grounds of age, it would attract the applicability of article 26. But it must still be discrimination. Every differentiation does not incur the vice of discrimination. If it is based on an objective and reasonable criterion having rational relation to the object sought to be achieved, it would not be hit by article 26. Here, in the present case, for the reasons given above, prescribing the age of 60 years as the age of mandatory retirement for airline pilots could not be said to be arbitrary or unreasonable, having regard to the need for maximizing safety, and consequently it was not in violation of article 26.

(*Signed*): Prafullachandra Natwarlal Bhagwati

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Z. Communication No. 986/2001, *Semey v. Spain**
(Views adopted on 30 July 2003, seventy-eighth session)

Submitted by:	Mr. Joseph Semey
Alleged victim:	The author
State party:	Spain
Date of communication:	18 December 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 July 2003,

Having concluded its consideration of communication No. 986/2001, submitted to the Human Rights Committee by Mr. Joseph Semey under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Joseph Semey,[1] a Canadian and Cameroonian citizen, currently being held at the Penitentiary Centre in Segovia, Spain.[2] He claims to be a victim of violations by Spain of article 14, paragraphs 1, 2, 3 (d) and (e), and 5, and article 26 of the International Covenant on Civil and Political Rights. In a later communication he also claims to be the victim of a violation by Spain of article 9, paragraph 1, of the Covenant. He is not represented by counsel.

The facts as submitted by the author[3]

2.1 On 29 October 1991, a woman named Isabel Pernas arrived in Lanzarote, one of the Canary Islands, aboard a flight from Madrid. On her arrival in Lanzarote, she was detained by police for a check. At that instant, a black passenger wearing cap and glasses quickly left the baggage retrieval hall without collecting a travel bag that supposedly belonged to him. The bag had been checked in under the name of Remi Roger. The woman, who was carrying drugs under her clothing, said that the drugs had been supplied to her by a man named Johnson in Madrid.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 The author of the communication, Joseph Semey, states that he was detained in Madrid on 7 February 1992 and wrongly sentenced to 12 years' imprisonment by the Las Palmas Provincial Court in March 1995 for a supposed offence against public health which he had never committed. According to the author, he was implicated in the incident solely on the basis of verbal statements made by Ms. Isabel Pernas. He maintains that he was implicated on account of hostile relations between himself, Joseph Semey, and the family of Ms. Pernas' boyfriend, a man named Demetrio. He explains that he had previously been in prison for direct involvement in the killing of Demetrio's cousin and had just got out of jail when he was wrongly caught up in this incident.

2.3 The author states that Ms. Pernas told the police she had met him in a Madrid discotheque the night before she was detained with the drugs, and it was at that meeting that he had supposedly arranged with her to transport the drugs from Madrid to Lanzarote. This, he says, is untrue, since on 28 October 1991 the discotheque (Discoteca Los Sueños) was closed for the day (he supplies a letter to that effect signed by the manager).

2.4 The story that he, Joseph Semey, accompanied Isabel Pernas on her trip to Lanzarote using the name Remi Roger is, the author explains, an invention by Ms. Pernas. According to the author, Remi Roger was a close friend of Isabel and her boyfriend, Demetrio. He, Remi Roger and another black man shared an apartment in Madrid. At the trial, Ms. Angela Peñalo Ortiz, the author's girlfriend, confirmed that Remi Roger, who is also black and resembles the author, really existed. It has never been shown, the author adds, that the items found in the bag left on the baggage conveyor at Lanzarote airport belonged to him.

2.5 According to the author, the examining magistrate departed from proper procedure when one of the members of the Civil Guard responsible for investigating the case, Francisco Falero, was allowed to pick him out in an identification parade and testify against him over a year after the incident had taken place. The police, says the author, knew all the details of the case and had his photographs on the police file.

2.6 The author also maintains that the Court found him guilty solely on the basis of the statements made by Ms. Pernas during the pre-trial proceedings and took no account of the evidence and defence witnesses that he put forward. He claims that on the morning of the incident he went to Herrera de la Mancha prison to see his compatriot, Nong Simon, but was unable to do so because visiting hours had changed; in the afternoon, after visiting the prison, he travelled with a Mr. and Mrs. Bell to Estepona. Mr. Bell stated as much to a notary. What Ms. Pernas says cannot, in the author's opinion, carry more weight than the evidence of other witnesses; he repeats that there is no proof he was in Lanzarote.

2.7 The author applied to the Supreme Court for judicial review of his case, but the Court limited itself to pronouncing on the grounds for review and upheld the sentence of the lower Court; at no time did it review the evidence on which the Provincial Court said it had based its guilty verdict. He also submitted an appeal to the Constitutional Court which was not entertained because it had been submitted too late, i.e. not when the Supreme Court handed down its decision.

2.8 The author applied to the European Court of Human Rights in Strasbourg but his application was declared inadmissible on the grounds that he had not exhausted domestic remedies (his appeal for protection - *amparo* - was not timely).

The complaint

3.1 The author maintains that he is the victim of violations by Spain of the following articles of the International Covenant on Civil and Political Rights.

(a) Article 26 and article 14.1

3.2 The author considers that he was found guilty because he was black, and says people in Spain have the idea that blacks and Latin Americans are bound up with the drugs trade. This, he claims, in combination with the racism that exists in the country, means that anything a Spaniard can say carries much more weight than anything said by a black. Had he been Spanish, he says, he would not have been sent to prison on the strength of the statements made against him. In this sense he claims that the principle of equality set forth in article 26 of the Covenant has been violated.

3.3 He also alleges a violation of article 14.1 of the Covenant, since in his case there was no equality before the courts and the courts were not impartial. Isabel Pernas was sentenced to 3 years in prison; he was sentenced to 12. The sentencing court, in the author's view, violated procedural safeguards in passing judgement on him on the strength of statements made during the pre-trial proceedings. He argues that an order for his imprisonment as the culprit was issued solely on the basis of what Isabel Pernas said, without his being given a hearing beforehand. The Court also summoned the same civil guards who had conducted the entire investigation against him so that one could testify for the prosecution and pick him out in an identification parade a year after the incident at issue (prosecution witness Francisco Falero). Mr. Falero had been involved several times in helping to transport him from the Penitentiary Centre to the chambers of the investigating magistrate during the judicial inquiries, and thus knew who he was. The committal for trial was also based on statements by Isabel Pernas and took no account of the various points in his favour. He claims that it is not up to him to prove that he was not in Lanzarote that day, but up to the prosecution to show that he was. He maintains it has not been shown that he was using the name of Remi Roger, nor that he was the owner of the travel bag abandoned at the airport. He repeats that a mere accusation cannot be regarded as convincing proof that an individual is guilty of a crime.

(b) Article 14.2

3.4 According to the author's account, Ms. Isabel Pernas was detained in the Canary Islands and, on the basis of her statements, he was detained in Madrid. Before he was transferred to the Canary Islands to appear before the judicial authority that had ordered his detention, an order for his imprisonment was issued citing him as the perpetrator of an offence against public health. On the strength of a mere verbal accusation, the author says, the imprisonment order should have cited him as a suspect, not the perpetrator of an offence. Ms. Pernas' statements cannot counteract the presumption of innocence. Anyone, the author says, must be given a hearing by the competent judicial authority before an order for imprisonment on charges can be issued. The only way to establish whether a person is guilty is by conducting a trial, and guilt can be pronounced only in a final judgement, not in an imprisonment order.

(c) Article 14.3 (d)

3.5 The author states that the investigating magistrate (Arrecife Trial Court No. 2) forced him to make his initial statements without his counsel present. He says that Ms. Carmen Dolores Fajardo was the roster attorney on duty, but she was not there and the magistrate made him make his statements in the presence of counsel for the prosecution, Ms. Africa Zabala Fernandez, alone. He maintains that the Supreme Court was wrong to state that he and the individual who implicated him had appointed the same counsel, Ms. Africa Zabala, to defend them: that was completely incorrect. He affirms that there is nothing to suggest that he appointed Ms. Zabala to defend him.

(d) Article 14.3 (e)

3.6 The author says that his counsel requested a face-to-face meeting between him and Ms. Isabel Pernas on a number of occasions (28 September, 22 October and 6 November 1992) but this was refused by the examining magistrate in the case. What is more, Ms. Pernas was put on trial before the author and could not be questioned either by the court or by author's counsel. The author says that Ms. Pernas' counsel and the public prosecutor came to an arrangement under which she was tried and sentenced to three years in prison.

(e) Article 14.5

3.7 The author claims that the Supreme Court did not re-evaluate the circumstances which led the Provincial Court to sentence him to 12 years in prison without verifying the oral accusation at his trial. He adds that the right to an effective remedy before the Supreme Court is routinely violated in all applications for judicial review (*casación*), as the Human Rights Committee has acknowledged.

(f) Article 9.1

3.8 In a second communication, the author maintains that requiring him to serve his full sentence of 12 years breaches article 9.1 of the Covenant, because article 98 of the Spanish Penal Code provides for parole after three quarters of the sentence. He says that he ought to have been granted parole but, because of the complaints he has lodged about the Spanish justice system, he is being made to serve his whole sentence.

3.9 The author goes on to say, without specifying which article of the Covenant might have been violated, that procedural safeguards have been breached since two trials have been conducted on the same offence. On 26 November 1993 the First Division of the Provincial Court in Las Palmas, Gran Canaria, tried Isabel Pernas and sentenced her to three years of short-term ordinary imprisonment. Two years later, the Fifth Division of the same Court conducted a second trial, against Joseph Semey, which Isabel Pernas did not attend. According to the author, the sentencing court says in its judgement that the statements made by Isabel Pernas can definitely be taken into consideration despite her absence from his trial; this contradicts the Criminal Proceedings Act, which states that pre-trial proceedings are merely a preparation for trial, and a trial can never be just a rubber stamp on the pre-trial proceedings. The police officers who conducted the investigation against him also failed to appear at the trial.

Information and observations of the State party on admissibility

4.1 In observations dated 17 September 2001, the State party requests the Committee to declare the communication inadmissible. It explains that, under article 2 of the Optional Protocol to the Covenant, the individual must have exhausted all available domestic remedies; that means that the domestic remedies have been correctly used and, thus, that they have been exercised within the legally established deadlines. If an individual seeks to exercise an available domestic remedy outside the deadlines, the domestic body must reject it for being outside the deadlines. The State party maintains that the author has not exhausted available domestic remedies, since exhausting means "exhausting correctly".

4.2 In this specific case, the Supreme Court handed down a judgement on 16 May 1996 which was communicated to Mr. Semey's representative on 13 June 1996. The deadline for applying for judicial protection (*amparo*) to the Constitutional Court is "within 20 days following notification of the court's decision", according to article 42.3 of the Constitutional Court Organization Act (No. 2/1979) of 3 October 1979. Mr. Joseph Semey submitted his application for judicial protection on 11 November 1998, two years after he had been notified of the verdict. Under the law, therefore, the Constitutional Court declared his application for judicial protection inadmissible for having been submitted after the deadline. Failure to exhaust domestic remedies because his application for judicial protection was submitted after the deadline was the reason why Mr. Semey's application to the European Court of Human Rights was rejected.

Comments of the author on admissibility

5.1 By communication dated 14 November 2001, the author explains that the Human Rights Committee has on several previous occasions rejected the claim of failure to exhaust the remedy of appeal to the Constitutional Court for judicial protection (*amparo*) advanced by the State party as grounds for requesting that the communication should be declared inadmissible - specifically in the case of Cesáreo Gómez Vázquez, whose counsel applied to the Committee immediately after the Supreme Court passed judgement, without exhausting the remedy of appeal to the Constitutional Court. As in the case of *Cesáreo Gómez Vázquez v. Spain*, the grounds advanced by Spain should be rejected in this instance.

5.2 The author claims that he did apply for judicial protection within the stated deadline but his application was not accepted. The Constitutional Court has on various occasions turned down basic appeals, in clear violation of the presumption of innocence. The author also claims the Court says that it cannot modify facts that have already been established, because it is not possible for a higher court in Spain to return to and evaluate the evidence in a case.

5.3 Regarding the stipulation in article 2 of the Optional Protocol, the author affirms that under article 5, paragraph 2 (b), of the Protocol not all domestic remedies have to be exhausted if their application is unreasonably prolonged: he is thus perfectly entitled to apply to the Committee without having exhausted the remedy of application for judicial protection under the Constitution. Lastly, it must be borne in mind that individuals' rights are more than just bureaucratic matters, and the fact that he has not exhausted the remedy of applying to the Constitutional Court for judicial protection is no reason why the violations of his rights that he has suffered should all go unpunished.

5.4 The author asserts that his application to the Constitutional Court for judicial protection was not submitted after the deadline. Under Spanish law, the deadline for submitting any kind of judicial appeal is reckoned from the day following final legal notification of the sentence or order against which appeal is to be lodged, and in this case the final legal notification was the official transcript of the final sentence by the sentencing court. This final official transcript of the final sentence, signed and sealed by the clerk of the court, is, according to the author, dated 25 September 1998, and he submitted his application to the Constitutional Court for judicial protection within the legal 20-day deadline. The author claims that in judgement No. 29/1981 of 24 July 1981, the Constitutional Court accepted that an appellant was entitled to lodge an appeal once he was in possession of the official transcript of the sentence.

5.5 The author explains that the Constitutional Court declared his application for judicial protection inadmissible, having been submitted outside the deadline, because in the Court's view he ought to have appealed in 1996, within 20 days of being notified of the Supreme Court's ruling. He points out that no one notified him of that ruling. He feels that, as a party concerned and as the party convicted, he ought to have been notified of it personally.

5.6 As the file shows, the Supreme Court notified Mr. Vázquez Guillén, the attorney who brought the application for judicial review (*casación*) before the Court. The author argues that notifying the attorney on his behalf is not legally valid, because he never gave the attorney any sort of authorization to accept any notification on his behalf. For someone to represent him legally would require a power of attorney signed by him before a notary, as stipulated by the Spanish Criminal Proceedings Act. At the time when the application for judicial review was submitted to the Supreme Court, the author says, he as a foreigner was unaware of what an attorney did. Mr. Guillén never spoke to him and they are not acquainted. For his appeal, the author says, he appointed Mr. Caballero as counsel.

Further observations by the State party on admissibility and the merits

6.1 In observations dated 16 January 2002, the State party returns to the question of admissibility. It mentions that the applicant expressly acknowledges that domestic remedies were not exhausted, since the application for judicial protection was submitted after the deadline, and seeks to justify his actions with three arguments:

(a) **First day of reckoning for the 20-day deadline for appealing the Supreme Court's ruling to the Constitutional Court**. According to the author, the period to the deadline does not begin to run with notification of sentence, but with final notice thereof. The State party says that the author is incorrect in this, and it is against all procedural standards to seek to confuse notification of a sentence for the purpose of challenge and receipt of an official transcript of the Court's final judgement for the purpose of execution of sentence. The applicant also alleges that he was given notice of the official transcript on 25 September 1998 and submitted his application for judicial protection within the 20-day deadline: 11 November 1998 is 47 days later;

(b) **The applicant says he did not appoint Mr. Vázquez Guillén as his attorney before the Supreme Court**. The State party submits a copy of the application to the Supreme Court for judicial review, which says "for the purposes of representation before this Chamber of the Court, he appoints the attorney Mr. Argimiro Vázquez Guillén, and the Lanzarote lawyer, Mr. Felipe Callero González, will continue to handle his defence";

(c) **The applicant considers that the Committee's ruling in the Cesáreo Gómez Vázquez case should apply to him**. The State party sees no resemblance between the case of Joseph Semey and the subject of the decision on admissibility in communication 701/96. In Joseph Semey's case, an application for judicial protection (*amparo*) was submitted - after the deadline, but it was submitted. No application for judicial protection was made in communication 701/96. In Joseph Semey's case the application for judicial protection discussed the presumption of innocence. Communication 701/96 claimed that judicial protection was unnecessary, given the Constitutional Court's repeated position that application for judicial review (*casación*) could be regarded as fulfilling the requirements of article 14.5 of the Covenant.

6.2 To conclude, the actual situation, as the applicant admits, is that domestic remedies were not exhausted correctly, and as a result the communication is inadmissible under article 2 of the Optional Protocol.

6.3 On the merits, the State party points out that the author indicates dissatisfaction with the way the domestic courts weighed up the evidence. The Committee, an international body, does not weigh up evidence, for that is the province of the domestic courts. Its task is to determine whether the weighing-up of the evidence in a criminal case, taken as a whole, was reasonable or, alternatively, arbitrary. The State party adds that the author was convicted in criminal proceedings in which the court gave appropriate reasons for its sentence and the sentence was subsequently upheld by the Supreme Court on reviewing the weighing-up of the evidence.

6.4 The State party mentions that Mr. Semey's defence strategy was to deny that he had been the person who gave the woman the drugs, bought her the clothes and plane ticket, and accompanied her on her trip, abandoning a large bag on the baggage retrieval conveyor. It refers to the judgement of the Provincial Court, which has the following to say about this claim:

> "The accused denied having ever had any connection to the delinquent behaviour of Isabel Pernas San Román, attributing the fact that she accused him directly of having supplied her with the drugs … to the fact that she was the girlfriend of Demetrio, whose cousin the accused had killed. The defence also expressed regret that Isabel had not been brought to the full court hearing for cross-examination, since that had not been possible during the earlier trial on the case.
>
> "It is our belief … that Isabel's statement can perfectly well be taken into account despite her absence from this trial because, first, her statements during the pre-trial proceedings, always made in the presence of a lawyer, have found their way into this trial in documentary form taken to be reproduced with the assent of the parties, thus providing access both to what Isabel said at the earlier trial, to which the representatives of the individual standing trial today and, hence, those representatives' managers, were expressly summoned, although they attended only the statements made during the investigation stage, including in particular her testimony under questioning during which, in the presence of and under questions from the accused Joseph Semey's defence lawyer then and now, she was cross-examined and said she was unaware that Joseph Semey had been convicted of killing one of Demetrio's cousins; second, Isabel's story is solidly backed up by the testimony of Civil Guard member Francisco Falero Guerra …"

6.5 Second, the author claims that he was not in Lanzarote on 29 October 1991 since he was visiting a friend in the Herrera jail that day and then travelled with an English couple to Estepona on the Costa del Sol. It is not at all clear that he did visit the prison, however, and prison officials deny that the visit took place since 29 October was not a visiting day. As for the journey from Herrera to Madrid and from Madrid to Estepona with an English couple, the Court says that this second alibi "proved utterly contrived and scarcely credible since, on the one hand, in his first statement to the examining magistrate (in the presence of two lawyers) the accused spoke only of his visit to Herrera and unpardonably omitted any reference to his trip to Estepona … and on the other hand, because the Bells' statement to the notary was made just eight days before Semey made his statement, in response to a telephone call along those lines from the defence lawyer, and this really robs what the English couple has to say of any spontaneity or unrehearsedness".

6.6 The State party says that one may agree or disagree with the weight attached by the court to this alibi, but its opinion cannot be criticized as arbitrary.

6.7 The State party also refers to the Supreme Court's ruling:

> "In view of the above, it must be recognized that the lower court had at its disposal during the trial oral evidence of the facts, and found, moreover, sufficient material in the proceedings to assess the credibility of that evidence, which rules out a breach of the right to presumption of innocence.
>
> "Furthermore, it has to be acknowledged that the trial court has given appropriate reasons for its sentence and that the accused has been suitably defended by a lawyer of his choosing, having received a reasoned response from the competent court."

6.8 The author regrets that there was no face-to-face confrontation between him and Isabel Pernas. Semey's lawyer asked the woman all the questions he thought appropriate during her interrogation, with due regard for the principle of adversarial proceedings. It is pointed out that in his response to the charges against him and at the opening of his trial, Mr. Semey did not suggest any face-to-face meeting between him and the woman. A copy of the court record is appended, showing that the principle of adversarial proceedings was respected and that the author of the communication and his lawyer made no complaint about his rights having been violated. If Mr. Semey's defence counsel wished to interrogate the woman and bring her face to face with his client at the trial, it was essential that he should suggest as much in the response to the charges. By communication dated 24 January 2002, moreover, the State party asserts that nowhere in his response to the charges did Mr. Semey request the appearance of Ms. Pernas at the trial.

6.9 As regards the difference in sentence between him and Ms. Pernas, the reason is obvious. The woman was tried for an offence against public health (as a mere accessory) and, given the mitigating circumstance of her spontaneous repentance, sentenced to three years in prison. Joseph Semey was put on trial as a drug trafficker and, given the aggravating circumstance of a previous offence (he was found guilty on 13 July 1987 of criminal homicide), sentenced to 12 years in prison.

6.10 The State party says it was never claimed either during the trial or in the application for judicial review that the author's counsel was not present when he made his first statement to the magistrate. By communication dated 24 January 2002, the State party reports that, after being detained in Madrid on 7 February 1992, Joseph Semey said he was appointing "the duty lawyer" as his counsel. That same day he made a statement before the magistrate in Madrid, asserting that his real name was Joseph Semey, not Spencer, in the presence of Ms. Carmen Martínez González, a lawyer. In Lanzarote, on 14 May 1992, he gave a statement to the magistrate in the presence of the duty counsel, Ms. Carmen Dolores Fajardo.

6.11 As regards the failure to apply the principle of *in dubio, pro reo*, the State party says that the sentencing court follows this principle when it is not certain if the accused is guilty, and then the doubt must be resolved in favour of the accused. In the present case, the sentencing court "found the appellant guilty without any doubt", as the Supreme Court put it.

6.12 The State party concludes by saying that it finds no violation of the safeguards established by article 14 of the Covenant, and submits that the communication should be declared inadmissible or, if appropriate, not entertained.

Comments by the author on the State party's observations

7.1 By communication dated 11 February 2002, the author points out that the document advanced by the State party as proof that he appointed Vázquez Guillén as his attorney is not legally valid. Under article 874 of the Criminal Proceedings Act, the attorney who will submit an application for judicial review (*casación*) to the Supreme Court in Spain has to be appointed by the appellant in writing before a notary, and for the power to represent to be legally accredited, besides the appellant and the notary, the attorney appointed must also sign himself. The document furnished by the State bears only one signature, the author points out: his own. The author also states that he never had any contact with the attorney in question, and that none of the notifications which the Supreme Court sent to Mr. Vázquez on his behalf were valid.

7.2 On his failure to exhaust the remedy of application to the Constitutional Court for judicial protection, the author refers once again to communication 701/96 and repeats that article 5, paragraph 2 (b), of the Optional Protocol does not require all domestic remedies to be exhausted if their application is unreasonably prolonged. Whereas the State party sees no resemblance between the two cases, he believes the opposite, i.e. that failing to lodge an appeal and doing so after the established deadline amount to the same thing. In either case the remedy is regarded as unexhausted, and the Committee's ruling on communication 701/96 ought to apply to him.

7.3 Regarding the State party's claim that the case was found inadmissible by the European Court of Human Rights because domestic remedies had not been exhausted, the author says that the Committee does not necessarily apply the same doctrine as the Court, especially given that article 5, paragraph 2 (b), of the Optional Protocol does not require all domestic remedies to be exhausted if their application is unreasonably prolonged.

7.4 On the merits, the author repeats what he said in earlier communications to the effect that a verbal accusation cannot amount to conclusive proof, and repeats his comments about the statements by Civil Guard member Francisco Falero.

7.5 The author repeats that he did indeed visit the prison at Herrera de la Mancha. He was given permission to visit his friend, Nong Simon, who was in the closed section (module 2). The visit was authorized four days before the incident at issue. The author explains that visiting days at module 2 were Mondays and Thursdays, and on Monday, 29 October 1991, he went there but was informed that Simon had been moved to another module three days previously and could not be visited, because in the new module the visiting days were Wednesdays and Fridays. As he was unable to visit Simon, it is logical, the author explains, that the visit did not officially take place. While he was there he did meet Trainer D. Juanjo, who said he remembered talking to him in late October but could not remember the exact date.

7.6 The fact that he had not mentioned the alibi of his journey to Estepona in his first statement to the examining magistrate did not mean that it was not true. He had said nothing because he feared compromising his friends by citing them as witnesses in an affair involving drug-trafficking. He had mentioned the point to his lawyer, who said that their testimony was very important and decided to telephone them.

7.7 Under the law, anyone accused of a crime is innocent until proved guilty; nowhere does the law say that a person shall be guilty until his innocence is proven. The author repeats that there is no physical evidence to implicate him in the incident, because he was detained, tried and convicted solely on the basis of the story told by Isabel Pernas.

7.8 On the reasons for his being sentenced to 12 years' imprisonment given the aggravating circumstance of a previous offence, the author says that under article 22.8 of the Spanish Penal Code it is considered that there is a repeat offence when, at the time he commits an offence, the culprit has previously been the subject of an enforceable judgement for a similar offence. In his case, this was the first time he had been arrested and found guilty of an offence related to drug-trafficking.

7.9 Concerning the statements he made without a lawyer, the author says it is true that when he was moved to the island for questioning by the investigating magistrate, Ms. Carmen Dolores Fajardo was the duty counsel. When he was taken to make his first statement to the magistrate in late April 1992, she was not there because of ill health, and the only lawyer in attendance was Isabel Pernas' lawyer, counsel for the prosecution Ms. Africa Zabala Fernández. At the time, the author says, he thought that the counsel present was his, since they were unacquainted. Only when he made his second statement, on 14 May 1992, and Ms. Carmen Dolores was present, did he realize that he had made his earlier statement without his lawyer there. He adds that his private counsel lodged a legal protest about this in the appeal for amendment against the order for trial, and did so again in the application for judicial review (*casación*).

7.10 The author points out that the statement he made before examining magistrate No. 6 in Madrid in the presence of Ms. Carmen Martínez had nothing to do with the Lanzarote case which prompted his communication to the Committee. That statement (to which the State party refers) was to do with the forged British passport he had when he was detained; the Madrid court could not take statements from him about the Lanzarote case because the Madrid magistrate had not been asked by his counterpart in Arrecife to take statements about the drug-trafficking issue.

7.11 The author repeats once again that his rights to be heard, to a fair trial and to effective legal protection have been violated. He again alludes to the falsehood of the statements made by Isabel Pernas and the irregularities in the statements and identifications made by the civil guard.

Issues and proceedings before the Committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the State party is contesting the communication on the grounds of failure to exhaust domestic remedies. However, the Committee has consistently taken the view that a remedy does not have to be exhausted if it has no chance of being successful. The Committee considers, as it did in the case of *Cesáreo Gómez Vázquez v. Spain* (communication No. 701/1996), that the case law of the Spanish Constitutional Court shows repeated rejections of applications for *amparo* against conviction and sentence. The Committee therefore considers that there is no obstacle to the communication's admissibility.

8.3 Pursuant to article 5, paragraph 2 (a), of the Optional Protocol, before considering a communication the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee is aware that there is a discrepancy between the Spanish text of article 5, paragraph 2 (a), and the English and French versions[4] which goes beyond a mere translation error and reveals fundamental differences in substance. This discrepancy was discussed by the members of the Committee at its fourth session in New York on 19 July 1978 (CCPR/C/SR.88).[5] Therefore, bearing in mind the decision taken on the matter in 1978, the Committee reiterates that the term "*sometido*" in the Spanish version should be interpreted in the light of the other versions, i.e. that it should be understood as meaning "is being examined" by another procedure of international investigation or settlement. On the basis of this interpretation, the Committee considers that the case of Joseph Semey is not being examined by the European Court. The Committee also notes that the State party has not invoked its reservation to article 5, paragraph 2 (a), of the Optional Protocol. Consequently, there is no obstacle to the communication's admissibility in this respect.

8.4 As to the author's allegation of a violation of article 26 of the Covenant, to the effect that he was convicted because he was black, the Committee believes that the author has not provided information to back up his complaint for purposes of admissibility within the meaning of article 2 of the Optional Protocol. Similarly, the Committee considers that the author's allegation of a violation of article 9, paragraph 1, of the Covenant, in that he was obliged to serve his entire sentence, has not been substantiated sufficiently for purposes of admissibility under article 2 of the Optional Protocol.

8.5 Concerning the claim that Isabel Pernas and the author were tried at different times, the Committee notes that the author has not established a link with the rights violated under the Covenant, hence this allegation is also inadmissible under article 3 of the Optional Protocol.

8.6 The Committee notes that the author's allegation of a violation of article 14, paragraphs 1 and 2, refers especially to the weighing of facts and evidence. As the Committee has stated on other occasions (*934/2000 G. v. Canada*), it is for the courts of States parties, and not for the Committee, to weigh up the facts in a particular case. It is not within the Committee's competence to review facts or statements that have been weighed up by the domestic courts unless the weighing-up was manifestly arbitrary or there was a miscarriage of justice. The information before the Committee does not show that the Spanish courts' weighing-up of the facts was manifestly arbitrary or can be considered to amount to a denial of justice. Consequently, this allegation too has not been substantiated for the purposes of admissibility under article 2 of the Optional Protocol.

8.7 Concerning the allegation of a violation of article 14, paragraph 3 (e), of the Covenant, relating to the refusal to arrange a face-to-face meeting, the material before the Committee shows that the parties participated in an adversarial procedure and that the author's defence counsel had the opportunity to interrogate Ms. Isabel Pernas. Similarly, the information before the Committee does not show that the author raised this question before the national courts before he submitted it to the Committee. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.8 With regard to the alleged violation of article 14, paragraph 3 (d), in that the duty lawyer was not present when the author made his statements before the examining magistrate in Arrecife, the Committee notes that, according to the State party, no such claim was made either during the trial or in the application for judicial review. It also notes that, according to the author, this was mentioned in the appeal for amendment against the order for trial and in the application for judicial review. The Committee has thoroughly examined the appeal for amendment and concludes that there is no mention of this point. Similarly, on examining the application for judicial review, the Committee found a note in the papers submitted by the author, reading "have not found the application for judicial review". Consequently, on the basis of the information submitted by the author, the Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.9 The Committee considers that the allegation of a violation of article 14, paragraph 5, has been substantiated with regard to admissibility and therefore proceeds to consider it on the merits.

Consideration on the merits

9.1 The Committee takes note of the author's arguments regarding a possible violation of article 14, paragraph 5, of the Covenant in that the Supreme Court did not re-evaluate the circumstances which led the Provincial Court to convict him. The Committee also notes that, according to the State party, the Supreme Court did review the sentencing court's weighing-up of the evidence. Despite the State party's position to the effect that the evidence was re-evaluated in the context of the judicial review, and on the basis of the information and papers which the Committee has received, the Committee reiterates its Views expressed in the Cesáreo Gómez Vázquez case and considers that the review was incomplete for the purposes of article 14, paragraph 5, of the Covenant. The Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation of article 14, paragraph 5, of the Covenant in respect of Joseph Semey.

9.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The author should be entitled to have his conviction reviewed in conformity with the requirements of article 14, paragraph 5, of the Covenant. The State party is under an obligation to prevent similar violations in the future.

9.3 Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently issued in Arabic, Chinese and Russian as part of this report.]

Notes

[1] Also known as Johnson or Spencer Mas vickky.

[2] The International Covenant on Civil and Political Rights and the Optional Protocol to the Covenant entered into force for the State party on 27 July 1977 and 25 April 1985 respectively.

[3] The facts are set out by the author in three communications dated 18 December 2000, 22 March 2001 and 14 November 2001.

[4] Article 5, paragraph 2 (a) "El Comité no examinará ninguna comunicación de un individuo a menos que se haya cerciorado de que: El mismo asunto no ha sido sometido ya a otro procedimiento de examen o arreglo internacionales" / "Le Comité n'examinera aucune communication d'un particulier sans s'être assuré que: La même question n'est pas déjà en cours d'examen devant une autre instance internationale d'enquête ou de règlement." "The Committee shall not consider any communication from an individual unless it has ascertained that: The same matter is not being examined under another procedure of international investigation or settlement."

[5] In the discussion, Committee members differed in the views on the subject:

Mr. Mora Rojas said that the Spanish text denied the Committee the possibility of considering matters which had already been submitted to another procedure of international investigation or settlement, and thus differed in substance from the other language versions. (…) He had doubts as to the competence of the Committee to initiate the correction procedure *proprio motu* or to ignore contradictions or mistakes in certain language versions and decide to apply the English text.

Mr. Tomuschat said that an international covenant could not have different meanings for the different State parties. Sir Vincent Evans said that the retention in the Spanish text version of a text which had been amended in the other versions had clearly been a mistake. (...) it was only fair to the Spanish-speaking States to make them aware of an issue which might affect their position on a given communication or influence their attitude towards ratifying the Optional Protocol or making a reservation on ratifying it.

At the end of the meeting the Chairman said that the report could reflect the consensus that the Committee would work on the basis of the English, French and Russian texts of article 5, paragraph 2 (a), of the Optional Protocol. Mr. Opsahl noted that the Committee had not made any decision in the abstract on the interpretation of the Optional Protocol, which was not within its competence.

AA. Communication No. 998/2001, *Althammer et al. v. Austria**
(Views adopted on 8 August 2003, seventy-eighth session)

Submitted by:	Mr. Rupert Althammer et al. (represented by counsel, Mr. Alexander H. E. Morawa)
Alleged victim:	The author
State party:	Austria
Date of communication:	22 April 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 August 2003,

Having concluded its consideration of communication No. 998/2001, submitted to the Human Rights Committee on behalf of Mr. Rupert Althammer et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Mr. Rupert Althammer and 11 other Austrian citizens residing in Austria. They claim to be victims of a violation by Austria of article 26 of the Covenant. The authors are represented by counsel.[1] The Optional Protocol entered into force for Austria on 10 March 1988.

The facts as submitted by the authors

2.1 The authors are retired employees of the Social Insurance Board in Salzburg (*Salzburger Gebietskrankenkasse*). Counsel states that they receive retirement benefits under the relevant schemes of the Regulations A of Service for Employees of the Social Insurance Board (*Dienstordnung A für die Angestellten bei den Sozialversicherungsträgern*).

2.2 Amongst various monthly entitlements, the Regulations provided for monthly household entitlements of ATS 220 and children's entitlements of ATS 260 per child for those with children up to the age of 27. On 1 January 1996, an amendment to the regulations came into effect which abolished the monthly household entitlement and increased the children's benefits to ATS 380 per child.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

2.3 On 8 February 1996, the authors filed a lawsuit in the Salzburg District Court seeking a declaratory judgement that the Salzburg Regional Social Insurance Board was under an obligation to continue paying them the household entitlement as part of their income as retired employees. The District Court dismissed the authors' claim on 11 June 1996. The Court stressed that retirement benefits are not rights protected against subsequent changes of the legal framework (wohlerworbene Rechte) provided that such changes are based on objective grounds and respecting the principle of proportionality. It concluded that the abolition of household entitlements did not concern essential aspects of retirement benefits but a supplementary allowance, was moderate in its extent (0.4 - 0.8 per cent of the retirement benefits), and justified by the fact that the decision to use, in times of financial constraints, the limited financial means for an increase of the children's benefits was based on legitimate motives of social policy. The authors' appeal was dismissed by the Appeals Court (*Oberlandesgericht Linz*) on 22 April 1997 in a judgement upholding this reasoning. The Supreme Court (*Oberster Gerichtshof*) rejected a further request for revision on 7 January 1998. All domestic remedies are thus said to be exhausted.

2.4 Counsel explains that Regional Social Insurance Boards are public law institutions and that the Regulation is a legislative decree (*Verordnung*) regulating almost all employment related matters of the Board, inter alia the amount of retirement benefits and their calculation, including increase or periodical adjustment. Counsel submits that many similarities exist between occupational pension schemes (*Betriebsrenten*) offered by private employers and the scheme based on the Regulation. However, the Regulation can be changed, unilaterally, by legislative decree of the State party.

The complaint

3.1 The authors allege that the amendment to the Regulations constitutes a violation of article 26 of the Covenant. The authors claim that although the amendment of the Regulations is objective on the face of it, it is discriminatory in effect, considering that most retirees are heads of households with a spouse as dependent and no longer have children under the age of 27. The impact of the amendment is therefore greater for retired than for active employees as it effectively abolishes the supplement for retirees' dependents altogether. It is argued that this adverse effect was foreseeable and intended.

3.2 The authors recall that the amendment is the third step in a series of modifications aimed at reducing the income of retired employees (for the earlier modifications, see cases Nos. 608/1995[2] and 803/1998[3]). It is stated that the cumulative effect of the reductions brings the present case within the threshold of manifest arbitrariness, in violation of the principle of equality before the law. It is further stated that the courts' failure to take the cumulative effect of the amendments into consideration by limiting their review to the isolated amendment in each case, failed to ensure that the authors enjoyed equal and effective protection against discrimination within the meaning of article 26 of the Covenant.

3.3 Counsel states that the same facts are also the subject of an application which the authors presented to the European Commission of Human Rights claiming a violation of the right to property (article 1 of the First Additional Protocol to the European Convention). He claims that this does not preclude the admissibility of the communication as the Covenant does not contain the right to property and the European Convention does not contain a provision which corresponds to article 26 of the Covenant.

State party's observations on the admissibility of the communication

4.1 By submission of 25 September 2001, the State party objects to the admissibility of the communication. It notes that the present communication was already transmitted to it as part of communication No. 803/1998. It argues therefore that the communication is inadmissible for violation of the principle *ne bis in idem*.

4.2 The State party further notes the authors' applications to the European Commission on the basis of the same facts as before the Committee were transferred to the European Court pursuant to article 5 (2) of Protocol No. 11 and that the Court declared them inadmissible on 12 January 2001 because they did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

4.3 The State party recalls its reservation in relation to article 5 (2) (a) of the Optional Protocol,[4] to the effect that it does not recognize the Committee's competence to consider any communication from an individual when the same matter has been examined by the European Commission of Human Rights. The State party explains that the purpose of the reservation was exactly to prevent successive consideration of the same facts by the Strasbourg organs and the Committee. In this connection, the State party points out that article 14 of the European Convention contains a discrimination ban which forms an integral part of all other rights and freedoms under the Convention. Even though the authors did not raise the breach of article 14 in conjunction with article 1 of the First Protocol, the State party asserts that the Court considers other provisions of the Convention ex officio. In this connection, the State party refers to the European Court's consideration in the authors' applications that they did not disclose any appearance of a violation of the rights and freedoms set out in the Convention. The State party concludes therefore that the authors in substance are presenting the same matter.

4.4 Furthermore, the State party argues that the European Court has examined the matter within the meaning of article 5 (2) (a), as its decision of inadmissibility was not based on formal reasons but of reasons of merit. In this context, the State party refers to the Committee's prior jurisprudence.[5]

4.5 As to the mention in its reservation of the European Commission of Human Rights, the State party recalls that at the time it made the reservation in 1987, the European Commission was the only instrument of international investigation or settlement under the European Convention on Human Rights and Fundamental Freedoms to which an individual complainant could resort. Following the reorganization of the Strasbourg organs through Protocol No. 11, the European Court has now taken over the tasks previously discharged by the Commission and should thus be seen as the successor of the Commission with regard to applications lodged by individuals. The State party concludes that its reservation is thus equally valid for applications now being examined by the European Court.

The authors' comments on the State party's submission

5.1 By letter of 15 October 2001 the authors respond to the State party's observations and submit that the present communication is not identical to communication No. 803/1998, even if it was initially considered jointly with this communication. Counsel submits that the authors of the communications are not identical and that the two communications concern two distinct alleged violations of the authors' rights under the Covenant.

5.2 As to the State party's objection under article 5 (2) (a) of the Optional Protocol and its reservation in this respect, counsel argues that when applying or interpreting a reservation, one should first ascertain whether the terms used are in itself sufficiently clear and unambiguous, and only if they are not, one may examine the context, object and purpose of the reservation. The reservation invoked by the State party is unambiguous in the sense that it excludes communications examined by the European Commission of Human Rights. Counsel argues therefore that the reservation has lost its field of application following the entry into force of Protocol No. 11 to the ECHR and there is thus no obstacle under article 5 (2) (a) of the Optional Protocol to the admissibility of the present communication.

5.3 Concerning the State party's arguments on the interpretation of the reservation, counsel argues that even at the time when the State party entered its reservation, it was the European Court of Human Rights or the Committee of Ministers that rendered final and binding decisions, that the individual was very much a party to the proceedings before the Court, and that the Commission was basically a fact-finding and screening body.

5.4 In reply to the State party's statement about the scope of its reservation, counsel argues that the Vienna Convention on the Law of Treaties prohibits resort to supplemental means of interpretation when the ordinary meaning, context and object and purpose are clear and claims that what the State party wanted to say cannot replace what it did say.

5.5 Counsel also argues that treaties safeguarding human rights, and even more so reservations, must be interpreted in favour of the individual and that any attempt to broaden the scope of a reservation must be categorically rejected.

5.6 With regard to the question whether or not the European Court has examined the same matter, counsel refers to the Committee's jurisprudence in this regard and concludes that the same matter is a petition that concerns the same individuals, facts and allegations of breaches of fundamental rights and freedoms. Counsel notes that the present case concerns the same facts and persons as in the application to the European Court of Human Rights but raises entirely different claims, since the communication to the Committee concerns rights that are protected exclusively by the Covenant (the right to equality) and the application under the European Convention concerns the right to property which is protected exclusively by that Convention and not by the Covenant. In this regard, counsel argues that article 14 of the ECHR does not provide for an independent right to material equality, but is an accessory right which does not offer the same protection as article 26 of the Covenant. Counsel refutes the State party's argument that the European Court considers other provisions ex officio when authors specify the provisions of the Convention. In this connection, counsel quotes from a letter received from the Secretariat of the Court pointing out objections to the admissibility of the applications on the ground of article 1 of the First Additional Protocol only without reference to article 14 of the Convention. He further argues that it appears from the letter that the Court rejected the admissibility of the application ratione materiae because the entitlements under pension schemes do not amount to property rights, and thus did not analyse the effect of the amendments.

State party's additional observations

6.1 By submission of 25 January 2002, the State party reiterates its arguments on the admissibility of the communication. With regard to its reservation concerning article 5 (2) (a) of the Optional Protocol, the State party notes that it entered this reservation in accordance with a recommendation by the Committee of Ministers on 15 May 1970, in order to prevent the possibility of successive applications to the different bodies. Seen in this context, it cannot be concluded from the wording of the reservation that the State party meant to diverge from the recommendation issued by the Committee of Ministers. The State party also refers to the domestic procedure concerning the ratification of the Optional Protocol: it recalls that the European Court is the legal successor to the European Commission and considers that counsel's argument about the role of the Commission has no bearing on the legal succession, especially since the State party's reservation was made in respect of the Commission's duty to decide on the admissibility of an application and to make a first assessment on the merits. The State party also rejects counsel's argument that its interpretation extends the scope of the reservation, as it has the same significance today as it had when entered. Moreover, the State party argues that it was by no means foreseeable in 1987 that the protection mechanism of the Convention would be modified.

6.2 With regard to the authors' argument that their applications were not examined by the ECHR within the meaning of the reservation, the State party argues that a rejection of a complaint by the ECHR pursuant to article 35, paragraphs 3 and 4, of the Convention presupposes an examination of the merits, so that the admissibility proceedings include, if only summary, a substantive assessment of a claim of a violation of the Convention. The State party reiterates therefore that the communication should be declared inadmissible in the light of its reservation to article 5 (2) (a).

6.3 With regard to the merits of the communication, the State party notes that the wording of the present communication is exactly the same as that of the communication which was sent to the State party as part of communication No. 803/1998, and it refers to its submissions in respect of the earlier communication. In these submissions, the State party argued that the effect of the amendments cannot be said to be of a discriminatory nature. The State party explains that the Regulations of Service is not a decree, but a collective agreement to which the authors are party and which is concluded between the Association of Social Insurance Institutions and the trade union.

6.4 The State party further argues that the cancellation of the household benefits does not constitute discrimination as this measure equally affects working and retired persons. The cancellation has been calculated to constitute a reduction of between 0.4 and 0.8 per cent of the total pension payment, which according to the State party cannot be regarded as unreasonable.

Author's comments on the State party's additional observations

7.1 By letter of 3 March 2002, the authors reiterate that the present communication is distinct from the original communication No. 803/1998. They add that it is not their decision whether to add the communication to the file of Case No. 803/1998 or to deal with it as a new case.

7.2 The authors challenge the State party's explanations of the raison d'être of its reservation and note that the recommendation of the Committee of Ministers was wider than the reservation actually made. The authors also point out that of the 35 States that are both party to the Optional Protocol and the European Convention only 17 States have made a reservation under article 5 (2) (a) of the Optional Protocol. They argue that the reference to the State party's intent cannot absolve it from the text of its reservation. The authors also take issue with the State party's statement that the scope of the reservation is not extended by its wider interpretation, and argue that without such interpretation the reservation would not apply at all.

7.3 Counsel also takes issue with the State party's analysis of the functions of the European Commission and the European Court, and moreover submits that discussions about the merger of the Commission and the Court already were under way since 1982, that is before the date of the State party's reservation, and that modifications of the European human rights protection system were thus foreseeable at the time.

7.4 The authors reiterate that the abolition of the household benefits is discriminatory in effect, because it affects retired employees to a greater extent than active employees who are more likely to benefit from the increase in children's entitlements than retired employees. They note that the State party has not addressed these arguments in its submissions.

7.5 By further letter of 23 April 2002, counsel submits recent data on the financial effects of the amendments to the regulations. It is said that for retired employees, the loss of income caused by the cumulative effect of the 1992 amendment (subject of communication No. 608/1995), the 1994 amendment (subject of communication No. 803/1998) and the 1996 amendment, subject of the present communication, over the period 1994-2001 varies from ATS 34,916.00 to ATS 141,757.00.[6]

Issues and proceedings before the Committee

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has noted the State party's argument that the communication is inadmissible because it had earlier been transmitted as part of communication No. 803/1998. The Committee observes that its decision of 21 March 2002 declaring inadmissible communication No. 803/1998 does not relate in any way to the contents of the present communication. Consequently, the Committee has not yet considered the claim contained in the present communication and the State party's objection in this regard can therefore not be upheld.

8.3 The Committee notes that the State party has invoked the reservation it made under article 5, paragraph 2 (a), of the Optional Protocol, which precludes the Committee from considering claims that have previously been "examined" by the "European Commission on

Human Rights". As to the author's argument that the application which he submitted to the European Commission was, in fact, never examined by that organ but declared inadmissible by the European Court of Human Rights, the Committee observes that the European Court, as a result of treaty amendment by virtue of Protocol No. 11, has legally assumed the former European Commission's tasks of receiving, deciding on the admissibility of, and making a first assessment on the merits of applications submitted under the European Convention. The Committee observes, for purposes of ascertaining the existence of parallel or, as the case may be, successive proceedings before the Committee and the Strasbourg organs, that the new European Court of Human Rights has succeeded to the former European Commission by taking over its functions.

8.4 Having concluded that the State party's reservation applies, the Committee needs to consider whether the subject matter of the present communication is the same matter as the one which was presented under the European system. In this connection, the Committee recalls that the same matter concerns the same authors, the same facts and the same substantive rights. The Committee on earlier occasions has already decided that the independent right to equality and non-discrimination embedded in article 26 of the Covenant provides a greater protection than the accessory right to non-discrimination contained in article 14 of the European Convention. The Committee has taken note of the decision taken by the European Court on 12 January 2001 rejecting the authors' application as inadmissible as well as of the letter from the Secretariat of the European Court explaining the possible grounds of inadmissibility. It notes that the authors' application was rejected because it did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols as it did not raise issues under the right to property protected by article 1 of Protocol No. 1. As a consequence, in the absence of an independent claim under the Convention or its Protocols, the Court could not have examined whether the authors' accessory rights under article 14 of the Convention had been breached. In the circumstances of the present case, therefore, the Committee concludes that the question whether or not the authors' rights to equality before the law and non-discrimination have been violated under article 26 of the Covenant is not the same matter that was before the European Court.

8.5 The Committee has ascertained that the authors have exhausted domestic remedies for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

9. The Committee therefore decides that the communication is admissible.

Consideration of the merits

10.1 The Human Rights Committee has examined the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The authors claim that they are victims of discrimination because the abolition of the household benefits affects them, as retired persons, to a greater extent than it affects active employees. The Committee recalls that a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate[7]. However, such indirect discrimination can only be said to be based on the grounds enumerated in article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionally affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds. In the circumstances of the instant case, the abolition of monthly household payments combined with an increase of children's benefits is not only detrimental for retirees but also for active employees not (yet or no longer) having children in the relevant age bracket, and the authors have not shown that the impact of this measure on them was disproportionate. Even assuming, for the sake of argument, that such impact could be shown, the Committee considers that the measure, as was stressed by the Austrian courts (paragraph 2.3 above), was based on objective and reasonable grounds. For these reasons, the Committee concludes that, in the circumstances of the instant case, the abolition of monthly household payments, even if examined in the light of previous changes of the Regulations of Service for Employees of the Social Insurance Board, does not amount to discrimination as prohibited in article 26 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of any of the rights contained in the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] An earlier communication submitted by many of the same authors was registered under No. 803/1998 and declared inadmissible by the Committee on 21 March 2002.

[2] See CCPR/C/57/D/608/1995, Committee's decision of 22 July 1996 declaring the communication inadmissible.

[3] See CCPR/C74/D/803/1998, Committee's decision of 21 March 2002 declaring the communication inadmissible.

[4] When ratifying the Optional Protocol on 10 December 1987, the State party entered the following understanding: "On the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

[5] Communication No. 452/1991 (*Glaziou v. France*), declared inadmissible on 18 July 1994.

[6] 1 euro is 13.7603 ATS.

[7] See the Committee's general comment No. 18 on non-discrimination and the Committee's Views adopted on 19 July 1995 in Case No. 516/1992 (*Simunek et al. v. the Czech Republic*) (CCPR/C/54/D/516/1992, para. 11.7).

BB. Communication No. 1007/2001, *Sineiro Fernandez v. Spain** (Views adopted on 7 August 2003, seventy-eighth session)

Submitted by:	Mr. Manuel Sineiro Fernández (represented by Mr. José Luis Mazón Costa)
Alleged victim:	Author
State party:	Spain
Date of communication:	15 November 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 August 2003,

Having concluded its consideration of communication No. 1007/2001, submitted on behalf of Mr. Manuel Sineiro Fernández under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 15 November 2000, is Manuel Sineiro Fernández, a Spanish national currently deprived of his liberty after being sentenced to 15 years' imprisonment for drug trafficking and belonging to an organized gang. He claims to be the victim of violations by Spain of article 9, article 14, paragraphs 1, 2, 3 (b) and 5, and article 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force on 24 January 1985. The author has been represented by counsel, but the latter has informed the Committee, in a note received by it on 3 March 2003, that he is no longer acting for the author.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The facts as submitted

2.1 On 6 September 1996, the Criminal Division of the National High Court found the author guilty of drug trafficking and belonging to an organized gang, and sentenced him to 15 years' imprisonment and a fine of 200 million pesetas.

2.2 On 28 July 1998, the Supreme Court denied the author's application for a judicial review (*casación*). The author submitted an application for *amparo* to the Constitutional Court, but this was rejected on 17 February 2000. In its ruling, the Supreme Court stated that it was not part of its functions to reconsider the evidence on which the court of first instance had based its conviction.

The complaint

3.1 The author claims a violation of article 9, paragraph 1, of the Covenant on the grounds that, since the sentence imposed by the High Court was not reviewed by a higher court, he is being detained illegally.

3.2 The author also claims a violation of article 14, paragraphs 1 and 3 (b), because his initial interrogation was conducted in the presence not of the counsel he himself had appointed but of court-appointed counsel, and because of the allegedly hostile and coercive presence of the police, who advised the judge throughout the statement procedure.

3.3 In respect of the allegations of a violation of article 14, paragraph 2, the author claims that the burden of proof rests with the prosecution, not the defence, since the accused has the right to the presumption of innocence. He claims that the only evidence against him was an incriminating statement by a co-defendant, and that that was flimsy because it was not corroborated by other evidence against the co-defendant.

3.4 As to the alleged violation of article 14, paragraph 5, the author claims that a higher court should carry out a full review of the evidence in, and the course of, any case tried at first instance, since an application for judicial review implies only a partial review of the judgement.

3.5 Lastly, the author claims a violation of article 26 of the Covenant on the grounds that he never had the right of appeal or the right to a full review of the conviction and the sentence handed down, having been tried at first instance by the National High Court. If the offence he committed had carried a less severe penalty, he would have been tried by the Central Criminal Court of the National High Court and would then have had the right to a full review of the conviction on appeal.

Observations of the State party on admissibility and the merits

4.1 In its communications of 22 October 2001 and 19 February 2002, the State party explains, in respect of the alleged violation of article 9 of the Covenant, that the author has been deprived of liberty for a reason established in the Penal Code and in accordance with the Criminal Procedure Act.

4.2 With regard to article 14, paragraph 5, the State party alludes to the Committee's opinion in respect of communication No. 701/1996,[1] that the issue is not the amendment, in the abstract, of Spanish legislation, but whether the appeal procedure followed provided the guarantees required under the Covenant. In this communication, the State party maintains that the alleged violation of article 14, paragraph 5, is inadmissible since, given that the issue is not the amendment, in the abstract, of the law, there is no reference in the author's communication to anything occurring during the domestic remedy procedure that might warrant that allegation.

4.3 With regard to the alleged violation of article 14, paragraph 2, of the Covenant, the State party points out that the High Court judgement indicated that all the evidence submitted was examined. The author's involvement in serious drug trafficking to which the conviction related has been adequately substantiated in adversarial proceedings in which the author exercised his full right to a defence. Moreover, the mere fact that the author disagrees with his conviction, stating vaguely that there is insufficient evidence, is no basis for a determination that judicial decisions violate the Convention. The State party therefore considers that this part of the communication is inadmissible.

4.4 In respect of the alleged violation of article 14, paragraph 1, of the Covenant, the State party points out that, during the proceedings before the National High Court, the Supreme Court and the Constitutional Court, the author was assisted by counsel of his own choosing. Furthermore, the author never made any such allegation in the documents he submitted during the domestic proceedings. Lastly, as regards the absence of any counsel of his own choosing during his first interrogation, the State party says that, besides the fact that he never raised the issue at the domestic level, the author simply refused to make a statement.

4.5 As to the allegedly hostile and coercive presence of the police while the author's statement was being taken, the State party points out that the High Court judgement addresses this allegation and that the version of events given by the author in his defence could not have been the result of fear or intimidation. Moreover, the Supreme Court, before which the author repeated his complaint, also replied in its judgement that there was no record whatsoever of police being present during the author's initial statement. Although the police were indeed present at the meeting between the author and the other defendant on 13 August 1992, there cannot be said to have been any intimidation on their part since the meeting took place in the presence of judicial officials and the co-defendants' lawyers. This part of the communication should therefore be declared inadmissible.

4.6 In respect of article 26 of the Covenant, the State party alludes to the Committee's comments of 20 July 2000 on communication No. 701/1996, *Gómez Vázquez v. Spain*, in which the Committee concluded, with reference to the fact that the Spanish system provides for various types of remedy depending on the seriousness of the offence, that different treatment for different offences does not necessarily constitute discrimination.

Author's comments on admissibility and the merits

5.1 With regard to article 14, paragraph 5, the author claims, in his comments of 27 December 2001 and 27 March 2002, that he was able to bring before the Supreme Court only his complaints concerning violations of fundamental rights and the misapplication of the law, and was not able to apply specifically for a review of his conviction on the grounds of lack of credibility of the prosecution witness. Lastly, he maintains that he was unable to obtain a review of the conviction in a higher court.

5.2 As to the State party's allegations that he did not raise the issue of a second hearing before the Supreme Court or the Constitutional Court, the author points out that the Constitutional Court has consistently held that judicial review meets the requirements set forth in article 14, paragraph 5, of the Covenant, concerning a second hearing in criminal cases.

5.3 With regard to article 14, paragraph 2, the author states that the only evidence presented by the prosecution was a statement by a co-defendant. He also expresses doubt about the statement by the Chief of Intelligence, Madrid, by whom the co-defendant was employed, that that informant had not passed on any information implicating the author.

5.4 With regard to the alleged violation of article 14, paragraphs 1 and 3 (b), the author rejects the State party's contention that he never raised the counsel issue during the domestic proceedings; he states that the point was raised in the application for judicial review and that that was the reason why he had refused to sign the first statement. He also claims that a police official admits that during the first interrogation two of the policemen in charge of the investigation provided the judge with information and advice.

5.5 Lastly, the author repeats that the allegations concerning articles 9, paragraph 1, and 26 should be considered on their merits, since they have not received a proper response from the State party.

Issues and proceedings before the Committee

6.1 In accordance with rule 87 of its rules of procedure, before considering any claims contained in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. It has also ascertained that the victim has exhausted domestic remedies for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.

6.3 With regard to the claim that there has been a violation of article 9 of the Covenant, the Committee considers that the author has not demonstrated, for the purposes of admissibility, in what way the failure of a higher court to review his sentence constitutes a violation of article 9. It therefore concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.4 With regard to the allegation that article 26 of the Covenant was violated because the Spanish system provides for various types of remedy depending on the seriousness of the offence, the Committee restates the position it adopted in its Views on communication No. 701/1996, *Gómez Vázquez v. Spain*, in which it concluded that different treatment for different offences does not necessarily constitute discrimination; it therefore declares this part of the communication inadmissible under article 3 of the Optional Protocol.

6.5 With regard to the author's allegations that the State party violated his right to the presumption of innocence because of the lack of evidence proving his guilt, the Committee observes that it has consistently taken the view that, in general, the facts and evidence submitted in a case are for the domestic courts to evaluate unless it can be shown that their evaluation has been manifestly partial, arbitrary or tantamount to a denial of justice. The Committee therefore concludes that the author has not substantiated his claim and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.6 With respect to the author's allegations that there was a violation of article 14, paragraphs 1 and 3 (b), because he did not have a lawyer of his own choosing during his first interrogation, and because of the hostile and coercive police presence, the Committee takes note of the State party's observations to the effect that the author was assisted by counsel of his own choosing during the trial and that he refused to make a statement during the interrogation stage. The State party also denies that the police acted coercively during the statement stage. Taking account of the arguments put forward by the State party, the Committee concludes that the author has not substantiated his claim and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.7 Lastly, the Committee declares the author's allegations regarding article 14, paragraph 5, are admissible and proceeds to a consideration on the merits in the light of the information provided by the parties, in accordance with the provisions of article 5, paragraph 1, of the Optional Protocol.

Consideration on the merits

7. As to whether the author has been the victim of a violation of article 14, paragraph 5, of the Covenant because his conviction and sentence were reviewed only by the Supreme Court, a procedure that constitutes a partial review of the conviction and sentence, the Committee refers to the position it adopted on communication No. 701/1996, *Gómez Vázquez v. Spain*. There, the inability of the Supreme Court, as the sole body of appeal, to review evidence submitted at first instance was tantamount, in the circumstances of that case, to a violation of article 14, paragraph 5. Similarly, in the present communication, the Supreme Court expressly stated that it was not part of its functions to reconsider the evidence on which the court of first instance had based its conviction. As a result, the author has been denied the full review of his conviction and sentence.

8. Accordingly, the Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The author's conviction must be reviewed in accordance with article 14, paragraph 5, of the Covenant. The State party is under an obligation to take the necessary measures to ensure that similar violations do not occur in future.

10. Considering that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently issued in Arabic, Chinese and Russian as part of this report.]

Notes

[1] Communication *Gómez Váquez v. Spain*, Views of 20 July 2000, paragraph 10.2.

CC. Communication No. 1014/2001, *Baban et al. v. Australia** (Views adopted on 6 August 2003, seventy-eighth session)

Submitted by:	Mr. Omar Sharif Baban (represented by counsel, Mr. Nicholas Poynder)
Alleged victims:	The author and his son, Bawan Heman Baban
State party:	Australia
Date of communication:	19 December 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 6 August 2003,

Having concluded its consideration of communication No. 1014/2001, submitted to the Human Rights Committee by Omar Sharif Baban under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Omar Sharif Baban, born on 3 May 1976 and an Iraqi national of Kurdish ethnicity. He brings the communication on his own behalf and that of his son Bawan Heman Baban, born on 3 November 1997 and also an Iraqi national of Kurdish ethnicity. The author and his son were detained, at the time of presentation of the communication, in Villawood Detention Centre, Sydney, Australia.[1] The author claims that they are victims of violations by Australia of articles 7, 9, paragraph 1, 10, paragraph 1, 19 and 24, paragraph 1, of the Covenant. The author is represented by counsel.

1.2 On 20 September 2001, the Human Rights Committee, acting through its Special Rapporteur on new communications, requested the State party pursuant to rule 86 of its rules of procedure not to expel the author and his son to Iraq, should the High Court reject the author's application scheduled for hearing on 12 October 2001, and whilst the case was before the Committee.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The text of two individual opinions signed by Committee members Sir Nigel Rodley and Ms. Ruth Wedgwood are appended to the present document.

The facts as submitted

2.1 The author contends that, in Iraq, he was an active member of the Patriotic Union of Kurdistan (PUK), had been threatened by the Kurdistan Democratic Party (KDP), and had been the target of an Iraqi Mukhabarat agent sent to carry out assassinations in Northern Iraq.

2.2 On 15 June 1999, the author and his son arrived in Australia without travel documentation and were detained in immigration detention under section 189(1) Migration Act 1958. On 28 June 1999, they applied for refugee status. On 7 July 1999, the author was interviewed by an officer of the Department of Immigration and Multicultural Affairs (DIMA).

2.3 On 13 July 1999, DIMA rejected the author's claim. On 6 September 1999, the Refugee Review Tribunal (RRT) dismissed the author's appeal against DIMA's decision. On 10 September 1999, DIMA advised the author that his case did not satisfy the requirements for an exercise of the Minister's discretion to allow a person to remain in Australia on humanitarian grounds. On 12 April 2000, Federal Court (Whitlam J) dismissed the author's application for judicial review of the RRT's decision.

2.4 On 24 July 2000, the author, along with other detainees, participated in a hunger strike in a recreation room at Villawood Detention Centre, Sydney. On 26 July 2000, the hunger strikers were allegedly cut off from power and contact with the outside world. Allegedly drugged bottled water was supplied. Guards were alleged to have forcibly deprived the hunger strikers of sleep by making noise. On 27 July 2000, the hunger strikers (and the author's son) were forcibly removed and transferred to another detention centre in Port Hedland, Western Australia. At Port Hedland, the author and his son were detained in an isolation cell without window or toilet. On the fifth day of his detention in isolation (his son was regularly fed from the day *after* arrival), the author discontinued his hunger strike, and, eight days later, he was removed from the cell. During the period of isolation, the author contends that access to his legal adviser was denied. On 15 August 2000, the author and his son were returned to the Villawood Detention Centre in Sydney to attend their hearing in the Full Federal Court.

2.5 On 21 September 2000, the Full Court of the Federal Court dismissed the author's further appeal against the Federal Court's decision. The same day, the authors lodged an application for special leave to appeal in the High Court of Australia.

2.6 In June 2001, the author and his son escaped from Villawood Detention Centre. Their current precise whereabouts are unknown. On 16 July 2001, the Registry of the High Court of Australia listed the author's case for hearing on 12 October 2001. On 15 October 2001, the High Court adjourned the hearing of the author's appeal until the author and his son were located.

The complaint

3.1 The author alleges that his treatment while on hunger strike, his forced removal, the failure to provide his son with food upon arrival at Port Hedland and his incommunicado detention there for 13 days violated article 7. Secondly, the author alleges that his and his son's deportation to Iraq would necessarily and foreseeably expose him to torture or "serious mistreatment" due to his past in that country, and give rise to a violation of article 7 by the State party.[2] He further refers to a variety of reports for the proposition that there is a consistent pattern of gross, flagrant or mass violations of human rights in Iraq.[3]

3.2 The author contends that mandatory detention upon arrival and inability for courts or administrative authorities to order his release is, as found by the Committee in *A. v. Australia*,[4] violation of article 9, paragraphs 1 and 4. The author observes that no justification for the prolonged detention has been advanced by the State party.

3.3 The author also alleges that his incommunicado detention for 13 days and his general treatment in detention amount to a violation of article 10, paragraph 1. He cites, in support, the Committee's prior jurisprudence[5] and general comment No. 21 on the rights of detainees, observations of the United Nations Special Rapporteurs on torture and states of emergency,[6] and international minimum standards concerning treatment of detainees.[7]

3.4 The author alleges that his hunger strike was a legitimate expression of his right to protest, and that his treatment at Villawood and forced removal to Port Hedland violated his rights under article 19. The action taken was not justified by any reference to national security or public order, health or morals.

3.5 The author further alleges that his son's detention and treatment is in breach of his right under article 24, paragraph 1, which should be interpreted taking into account the obligations set out in the Convention on the Rights of the Child. No consideration has been given to his best interests and/or to release. According to the author, it is fallacious to argue that his best interests are served by keeping him with his father, as his father's prolonged detention was unjustified and both individuals could have been released pending determination of their asylum claims.

The State party's submissions on the admissibility and merits of the communication

4.1 By submissions of 26 March 2002, the State party contests the admissibility and the merits of the communication, arguing, as a preliminary issue, that the author's counsel has no standing to act. It argues that due to the long delay between provision of the authority and lodging of the communication, coupled with the abscondment of the author and his son, it is not apparent that the author's counsel has ongoing authority to continue with the communication on their behalf.

4.2 As to the author's claim under article 7 concerning expulsion to Iraq, the State party observes that the author's appeal to the High Court concerning his asylum claim stands adjourned until their whereabouts have been determined, and that thus available and effective remedies remain to be exhausted. The State party also submits there is no victim - prior to the author's abscondment, it had taken no steps towards removal, and, as the author and his son have now absconded, the issue of removal is purely hypothetical at the present time. The State party further contends that this claim is inadmissible for lack of substantiation.

4.3 Concerning the claim under articles 7 and 10 concerning mistreatment and conditions of detention, the State party argues that there are a number of civil actions which could be pursued in court, where the allegations made (denied by the State party) would have to be proven on the balance of probabilities. These include an action in negligence against the Commonwealth, for misfeasance in public office, for battery and assault. Additionally, a criminal complaint for unlawful assault could be made to the police. Furthermore, the author could complain to the Commonwealth Ombudsman, who is empowered to make recommendations, and to DIMA concerning treatment in detention. The State party also points out that the author has lodged a complaint with the Human Rights and Equal Opportunity Commission (HREOC), which has not yet been resolved. It also argues that these claims are insufficiently substantiated, as, for example, no witness statements or details of detainees or staff who could provide evidence are supplied in substantiation of the allegation.

4.4 As to the author's claims under article 9, the State party argues that the adjournment of the High Court hearing means that remedies are still available. Moreover, habeas corpus/mandamus proceedings remain available in the High Court to test the lawfulness of detention. The State party also argues that these claims are unsubstantiated, as the author has in fact accessed its courts, which have the power to determine legality of detention.

4.5 The State party argues that the claim under article 19 is incompatible with the Covenant, as a hunger strike is not expression through a "media" protected by article 19, paragraph 2, nor was it contemplated by the Covenant's drafters. It is not in the same class as oral, written, print or artistic media, which is the context of the provision. To the State party, this allegation is also insufficiently substantiated, and for the reasons advanced in respect of articles 7 and 10 concerning mistreatment in detention, domestic remedies remain available.

4.6 Concerning the claim under article 24, the State party notes that the author, as parent/guardian, had standing to pursue remedies on behalf of his son. A number of remedies were available to vindicate his son's rights - a HREOC complaint has been lodged, but not yet concluded; a complaint to DIMA about his treatment in detention; a complaint to the Commonwealth Ombudsman; and/or habeas corpus/mandamus action in the High Court of Australia challenging his detention.

4.7 On the merits, the State party denies that any of the claims disclose a violation of the Covenant. As to the claim of mistreatment contrary to articles 7 and 10, the State party observes that a report into the incident found that power to the recreation room at Villawood was turned off at 9 a.m., after threats of self-harm by electrocution. Power remained on elsewhere and detainees were free to leave the room at any time. The State party submits that the cessation of power for a short period (less than a day) was necessary for the detainees' safety and thus not contrary to article 7. The report also states, contrary to what was alleged, that water supply was maintained at all times. The State party denies that the author or anyone else was drugged - the report found no evidence of this or indeed that any bottled water was supplied.

4.8 Concerning the allegation of denial of contact with the outside world, the State party points out that access to the recreation room was suspended in the afternoon of 24 July 2000 for security reasons. On 25 July 2000, further on-site and telephone contact was suspended throughout the centre. These measures were in place for a short period and necessary in the circumstances, while the detainees could leave at any time. This accordingly does not amount to incommunicado detention where a detainee is totally cut off from the outside world. The State party denies that guards engaged in forcible sleep deprivation, with an investigation finding no evidence (such as detainees' or officers' statements) to support such a claim.

4.9 As to handcuffing upon removal from the centre, the State party observes from DIMA's response to HREOC's inquiry that the hunger strikers were detained and removed from the recreation room peacefully and without force or incident. The author was minimally restrained (that is, he had sufficient movement to assist his son) with plastic wrist restraints as a precautionary measure, as he was classified as a high-risk detainee with known behavioural problems. The restraint was used for a short period during transfer and was for the safety of involved detainees and officers. After take-off, the restraints were removed. At no point during the transfer were restraints (apart from seatbelts) used on the author's son or any other minor.

4.10 The State party denies any alleged failure to provide the author's son with food upon arrival at Port Hedland, the State party, observing that the detainees arrived at 1440 hours on 29 July 2000 and were issued with meals at 1840 hours that evening. Food was delivered to the block where the author was located. He and others refused to leave their rooms, so meals were placed in their room so they could eat if they chose to. Milk was available to adults and children. Lunch and refreshments were also provided to all passengers in-flight when the author and his son were transferred from Sydney to Port Hedland.

4.11 As to the alleged incommunicado detention at Port Hedland, the State party observes that apart from the first night (29 July 2000) when detainees were confined to rooms for individual discussions and security assessments, all detainees were free to move around the block, including the common room and external exercise yard. The author made four phone calls from Port Hedland, and declined an offer to make a further call on 11 August 2000. He made no request to talk to his lawyer or friends. The State party rejects the proposition that he was placed in an isolation cell - his room was in a standard detention block with 12 rooms each on two levels. Each level has central toilet facilities and a common room with a sink, fridge, microwave oven and television. Each room has natural light and can accommodate four persons, and the author and his son were in one such room. All detainees were free to move around the building, including the common room and external exercise yard. It follows from all of the above that the author has not established any acts or omissions of a severity rising to the threshold that would raise issues, in the light of the Committee's jurisprudence, under articles 7 or 10, paragraph 1.

4.12 As to the claim under article 7 concerning the author's removal to Iraq, the State party argues that the obligation of non-refoulement does not extend to all Covenant rights, but is limited to the most fundamental rights relating to the physical and mental integrity of a person. It argues that the author and his son would not be at risk of torture or similar treatment by removal to Iraq, and that no Iraqis have been removed there from Australia to date. As their whereabouts are not known, there is no proposal at this stage to do so, and in the event they are located, a decision will be made at that time. Even if their removal was proposed, the State party rejects that a necessary and foreseeable consequence would be torture or analogous treatment in Iraq. It notes that other countries, for example the Netherlands, have successfully returned persons to northern (Kurdish-controlled) territories in Iraq without risk. The IOM also provides assistance with the voluntary return of detainees to these areas. The RRT, on the facts, did not accept that the author was at any specific risk, either as an alleged PUK member or as an illegal emigrant, and the Committee is invited to give due weight to this body's finding.

4.13 Regarding article 9, paragraph 1, the State party argues that detention of the author and his son was reasonable and necessary in all the circumstances, and was not inappropriate, unjust or unpredictable. The State party observes that the detention was lawful under the Migration Act. As to arbitrariness, the State party argues that mandatory immigration detention is necessary to ensure that non-citizens entering Australia are entitled to do so and to uphold the integrity of its immigration system. Detention ensures that persons do not enter until their claims are properly processed, and provides effective access to such persons in order promptly to investigate and process their claims. Moreover, the State party has no system of general registration or identification which is required for access to the labour market or social or public services - thus it is difficult to monitor illegal immigrants within the community.

4.14 The State party's experience has been that unless detention is strictly controlled, there is a strong likelihood of abscondment. Previous detention of unauthorized arrivals in unfenced migrant hostels with a reporting requirement resulted in abscondment, with co-operation of local ethnic communities proving difficult. Accordingly, it is reasonable to suspect that if people were released into the community pending finalization of applications, there would be a strong incentive to disappear unlawfully into the community. The State party points out that the High Court of Australia has upheld the constitutionality of the immigration detention provisions, finding that they were not punitive, but reasonably capable of being seen as necessary for purposes of deportation or of enabling an entry application to be made and considered.[8] It also notes that provision exists for release in exceptional circumstances.

4.15 According to the State party, the individual circumstances of the case show that the detention was justifiable and appropriate. Upon arrival, the author claimed ignorance of all details concerning his documentation and travel, suggesting a lack of co-operation and a need for further investigation. If allowed to enter, the author and his son would be unlawful immigrants. They were initially detained for processing asylum claims, were (and remain) free to leave Australia at any time, and remained in detention as they themselves chose to pursue review and appeal possibilities. Their detention was proportionate to the ends sought, that is, to allow consideration of the author's claims and appeals, and to ensure the integrity of Australia's right to control entry.

4.16 The State party argues that the facts of the case are distinguishable from the situation in *A. v. Australia*,[9] which, in any event, the State party contends was wrongly decided. In this case, the length of detention prior to abscondment (21 months) was significantly less than the four years at issue in *A*'s case. The author's application for a protection visa was processed within 15 days, compared to the 77 weeks in *A*'s case. The State party argues that, due to the author's abscondment, there is not currently any detention that can be deemed arbitrary, and the Committee should not condone a breach of Australian law.

4.17 As to the claim under article 9, paragraph 4, the State party observes that the Federal Court had jurisdiction in the present case to review the refusal of a protection visa. As the decision in relation to the protection visa led to the continuing detention of the author and his son, the State party submits that the ability to access the Federal Court (as the author did) satisfied the requirements of article 9, paragraph 4. In addition, habeas corpus/mandamus review is available in the High Court to test legality of detention.

4.18 As to the claim under article 19, the State party submits that no evidence has been provided for how the author's transfer to Port Hedland violated his right to hold opinions and to freedom of expression. At all times, he was able to exercise these rights, and did so, for example by signing a memorandum of protest to the Prime Minister on 14 July 2000. If the Committee were to consider a hunger strike as a "media" of expression protected by article 19, paragraph 2, (which the State party rejects), the State party submits that this was not restricted by removal, nor was removal designed as a form of punishment. Indeed, the author's wish to continue his hunger strike at Port Hedland was respected.

4.19 The State party observes that the hunger strike and barricading of the Villawood recreation room was a very serious incident, with some detainees preventing others requiring medical assistance from seeing medical staff and preventing some from leaving the recreation room. The incident threatened the health and long-term well-being of several detainees including a diabetic, a pregnant woman and very young children, and removal of those involved to other facilities was therefore a matter of safety. The State party refers to its submissions above that at Port Hedland, the author was able to move about and contact the outside world. It submits that confining the detainees to their rooms for a security assessment overnight did not interfere with the author's rights under article 19.

4.20 If the Committee were to consider that the author's removal interfered with his rights under article 19, paragraph 2, the State party submits that, in any event, the measure was justified under article 19, paragraph 3. The removal was lawful under regulations governing the operation of centres and supervision of detainees. The measure was further required to respect the rights of other detainees (see preceding paragraph), to maintain the good order and security of the facility, and to protect the safety and security of visitors (intelligence reports indicated other detainees were going to join the demonstration using violence).

4.21 As to the claim under article 24, the State party explains that its immigration detention standards take the health, safety and welfare of children into particular consideration. Social, recreational and educational programmes tailored to each child's needs are supplied. External excursions are organized. Specialist medical care is provided as required. Upon a child's admission, a child's needs in areas such as education programmes, religious studies and recreational activities are elaborated in close consultation with parents. Provision for contact with family members abroad is arranged wherever possible, and care is taken to locate children in a facility where one or more adults can take a care and mentoring role. There are arrangements for children to be released into the community on bridging visas, where appropriate care and welfare arrangements can be made. The best interests of the child are individually assessed in determining eligibility for this programme. All these services are subject to administrative (such as by the Government's Immigration Detention Advisory Group) and judicial review, as well as parliamentary scrutiny and accountability.

4.22 As to the particular circumstances of the author's son, it was assessed that his best interest was to have him co-located with his father, as he has no other family in Australia. He only remained in detention while his father's status was being determined, and while his father subsequently appealed. The decision to remove the detainees from the recreation room was motivated by concern for the health of children in particular, and, for their safety, children were removed first. Staff cared for the author's son during the transfer to Port Hedland, where he was housed with his father in a standard block near other families. That centre's counsellor visited his accommodation area several times, organizing games and activities for children. The State party submits that these measures satisfy its obligations under article 24.

Counsel's comments on the State party's submissions

5.1 By letter of 10 February 2003, the author's counsel responded to the State party's submissions, arguing, as to standing, that the State party is challenging his retainer to represent the authors. He refers to common law authority for the proposition that a lawyer has authority to act as the general agent of a client in all matters which may reasonably be expected to arise for decision in a case. The onus of proof lies on the (State) party seeking to establish the absence of a retainer. Under common law, a retainer is evidenced by producing a copy of the signed retainer, which counsel recalls he attached to the original communication.

5.2 Counsel provides a copy of a sworn affidavit, dated 10 February 2003, that (i) after the author's escape from detention, he received a phone call from him; (ii) in November 2001, he had a discussion about the author with a member of the Iraqi community; and (iii) as a result of these discussions, he is satisfied that he has ongoing authority to proceed with the communication.

5.3 As to the admissibility of the claim under article 7 concerning mistreatment, counsel refers to the Committee's jurisprudence that a complaint to HREOC or the Commonwealth Ombudsman are not effective domestic remedies, for the purposes of the Optional Protocol, as remedies indicated by these bodies are not enforceable and have no binding effect.[10] A complaint to DIMA would be of similar effect. Civil action would not be an effective remedy, as the most that could be achieved would be an award of damages, rather than recognizing a breach of a human right, the purpose of the communication. Criminal sanctions would not have provided an effective remedy to the author, but could only have led to punishment of the perpetrators. In any event, no criminal charges were laid and no criminal investigations conducted.

5.4 As to the claim under article 7 concerning the author's removal to Iraq, counsel contends that if and when the author and his son are taken into custody, an obligation to remove them will arise under the Migration Act, and, as Iraqi citizens, the only place that they could be removed to would be Iraq. Counsel assumes that the current situation for Kurds in Iraq is well known to the Committee, and serious violations of their Covenant rights would be a necessary and foreseeable consequence of removal.

5.5 As to article 9, counsel refers to a variety of reports criticizing the State party's mandatory detention policy.[11] Counsel also argues that the Committee's decision in *A. v. Australia*,[12] followed in *C. v. Australia*,[13] conclusively established that the regime breaches article 9, paragraphs 1 and 4. The present case is not factually distinguishable from either of these two previous cases, if anything the detention of a minor makes it a more serious situation, and therefore the principles the Committee has already established should be applied.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 As to the State party's rejection of counsel's standing to proceed with his handling of the communication, the Committee is of the view that an authorization duly provided in advance of the communication confers, in the ordinary course, sufficient authority on counsel to see a communication through to its conclusion. In the present case, the Committee does not consider that the length of time before the communication was in fact filed and registered, or subsequent circumstances, can negative the inference that counsel was, and remains, duly authorized.

6.4 As to the author's claim under article 7 concerning possible deportation to Iraq, the Committee notes that after his abscondment, the High Court adjourned his application appealing against the RRT decision until his whereabouts are determined. It follows that, at the present time, there remain domestic remedies available in respect of this claim. This claim is accordingly inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.5 Concerning the claims of mistreatment under articles 7 and 10 in relation to the treatment of the author and his son at Villawood, their removal to Port Hedland and the treatment there, the Committee notes the State party's responses to the issues raised, including the results of the investigations undertaken, and that these conclusions have not been disputed by the authors. In the circumstances, accordingly, the Committee is of the view that the authors have failed to substantiate, for purposes of admissibility, their claims in respect of these issues. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.6 As to the author's claims under article 9, the Committee notes that the State party's highest court has determined that mandatory detention provisions are constitutional. The Committee observes, with reference to its earlier jurisprudence, that as a result, the only result of habeas corpus proceedings in the High Court or any other court would be to confirm that the mandatory detention provisions applied to the author as an unauthorized arrival. Accordingly, no effective remedies remain available to the author to challenge his detention in terms of article 9, and these claims are accordingly admissible.

6.7 Concerning the author's claims under article 19, the Committee, even assuming for the sake of argument that a hunger strike may be subsumed under the right to freedom and expression protected by that article, considers that in the light of the concerns invoked by the State party about the health and safety of detainees, including young children, and other persons, steps lawfully taken to remove the hunger strikers from a location giving rise to these concerns may properly be understood to fall within the legitimate restrictions provided for in article 19, paragraph 3. It follows that the author has not substantiated, for the purposes of admissibility, his claim of a violation of his rights under article 19 of the Covenant.

6.8 As to the claim under article 24, the Committee notes the State party's argument that in the absence of other family in Australia, the best interests of the author's infant son were best served by being located together with his father. The Committee considers, in the light of the State party's explanation of the efforts undertaken to provide children with appropriate educational, recreational and other programmes, including outside the facility, that a claim of violation of his rights under article 24 has, in the circumstances, been insufficiently substantiated, for purposes of admissibility. Insofar as the claim under article 24 concerns his subjection to the mandatory detention regime, the Committee considers this issue is most appropriately dealt with in the context of article 9, together with his father's admissible claim under that head.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

7.2 As to the claims under article 9, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.[14] In the present case, the author's detention as a non-citizen without an entry permit continued, in mandatory terms, until he was removed or granted a permit. While the State party advances particular reasons to justify the individual detention (para. 4.15 et seq.), the Committee observes that the State party has failed to demonstrate that those reasons justified the author's continued detention in the light of the passage of time and intervening circumstances such as the hardship of prolonged detention for his son or the fact that during the period under review the State party apparently did not remove Iraqis from Australia (para. 4.12). In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions. The Committee also notes that in the present case the author was unable to challenge his continued detention in court. Judicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and, by direct operation of the relevant legislation, the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant. Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.[15] In the present case, the author and his son were held in immigration detention for almost two years without individual justification and without any chance of substantive judicial review of the continued compatibility of their detention with the Covenant. Accordingly, the rights of both the author and his son under article 9, paragraphs 1 and 4, of the Covenant were violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 9, paragraphs 1 and 4, of the Covenant in respect of the author and his son.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including compensation.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] See, however, paragraph 2.6.

[2] The author refers to the Committee's decisions in *ARJ v. Australia* Case No. 692/1996, Views adopted on 11 August 1997, and *T v. Australia* Case No. 706/1996, Views adopted on 4 November 1997.

[3] *Situation of Human Rights in Iraq*, Report submitted by the Special Rapporteur in accordance with Commission on Human Rights resolution 1998/65 (E/CN.4/1999/37, 26 February 1999, at paras. 82-83; Human Rights Watch *World Report 2000* available at www.hrw.org/hrw/wr2k1/mideast/iraq.html#government and #kurdistan.

[4] Case No. 560/1993, Views adopted on 3 April 1997.

[5] The authors refer to *Arzuada Gilboa v. Uruguay* Case No. 147/1983, Views adopted on 2 November 1985, where the Committee found a violation of article 10, paragraph 1, following a 15-day period of incommunicado detention.

[6] The authors point out that the Special Rapporteur on torture has observed that incommunicado detention "should not exceed seven days" (E/CN.41/1986/15), while the Special Rapporteur on states of emergency has called for the right of "habeas corpus or other prompt or effective remedy" to be treated as non-suspendable (cited in Marks, S. "Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights", (1995) 15 Oxford Journal of Legal Studies 69, at 82-83.

[7] The authors observe Third Committee of the General Assembly made express reference to the Standard Minimum Rules for the Treatment of Prisoners (1957) when dealing in 1958 with article 10 in draft. The Committee has considered these Rules relevant to article 10 in both its general comment 21 and in its consideration of States parties' periodic reports under the Covenant.

[8] *Chu Kheng Lim v. Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1.

[9] Op. cit.

[10] *C. v. Australia* Case No. 900/1999, Views adopted on 28 October 2002.

[11] Human Rights and Equal Opportunity Commissions "Those who've come across the seas: Detention of unauthorized arrivals" available at www.hreoc.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf; United States State Department Country Reports on Human Rights Practices for 2000 (February 2001) available at www.state.gov/g/drl/rls/hrrpt/2000/eap/index.cfm?docid=673; Human Rights Watch Special Report *Refugees, Asylum Seekers and Internally Displaced Persons* available at www.hrw.org/wr2k1/special/refugees.2html; Amnesty International *Annual Report 2000*; and Steel, Z., Moilica, R. "Detention of asylum seekers: assault on health, human rights and social development" *The Lancet* vol. 357, 5 May 2001, at 1436.

[12] Op. cit.

[13] Op. cit.

[14] *A. v. Australia* and *C. v. Australia*, op. cit.

[15] Ibid.

APPENDIX

Individual opinion of Committee member Sir Nigel Rodley (dissenting in part)

For the reasons I gave in my separate opinion in *C. v. Australia* (Case No. 900/1999, Views adopted on 28 October 2002), I concur with the Committee's finding of a violation of article 9, paragraph 1, but not with its finding of a violation of article 9, paragraph 4.

(*Signed*): Nigel Rodley

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Ms. Ruth Wedgwood (dissenting)

I am unable to agree with the Committee's supposition that any legislative standards requiring the detention of any class of unlawful entrants and limiting a court's discretion during the pendency of immigration proceedings must per se violate article 9 of the Covenant. The guarantee of article 9 against arbitrary detention, in the Committee's view, requires not simply that a person must have access to court review, but that the standards for the court's evaluation must be unfettered. The legislature's own factual conclusions about the success or failure of policies of supervised release or problems of non-reporting by particular classes of unlawful entrants do not, apparently, merit weight.

This same logic could be deployed to challenge any mandatory penal sentences in criminal cases, since there too a court is limited to evaluating facts without discretion to alter the consequences that flow from those facts.

While article 9, paragraphs 1 and 4, of the Covenant may well require reference to substantive standards beyond domestic law - i.e., an action could be arbitrary under the Covenant even though it complies with domestic law - nonetheless there is no grounding in the Covenant to dictate that courts must be the repository of all policy judgements and standard-setting in difficult areas such as unlawful immigration. And it is certainly ironic to excuse the complainant under the Optional Protocol from his failure to exhaust domestic appellate remedies, and then to fault the state party for the absence of independent judicial decision.[1] Of course, the complainant's special leave to appeal to the Australian High Court has been held in abeyance since he became a fugitive from the Australian immigration authorities.[2]

In deciding whether his prior detention was arbitrary, one should note that Australia adjudicated the merits of his immigration claim with considerable dispatch. He arrived in Australia without any travel documents or any account of his itinerary, and filed an application for political asylum based on a claimed "well-founded fear of persecution" two weeks later. Australia assessed and denied his claim within another two weeks (i.e., within one month of his arrival in the country). His appeal to the Refugee Review Tribunal was decided within another two months, and four days later, the ministry concerned with immigration matters acted upon (and denied) his application for the exercise of discretion on humanitarian grounds. It was the author's decision to pursue three further avenues of judicial appeal in Federal Court and the Australian High Court, that prolonged the final disposition of his case beyond a period of three months, and even there, the author's appeals to both the Federal Court and the Full Court of the Federal Court were decided within another year. The author decided to seek special leave to appeal to the Australian High Court, and the case was listed for hearing, and adjourned only because the author had absconded.

The author does not argue that Australia's substantive denial of his asylum claim was arbitrary nor does he challenge the minister's denial of humanitarian relief. Rather he argues that his detention as an asylum applicant was arbitrary and unreasonable because in his individual case, conditions of supervised release might have sufficed to prevent his flight, and a court should have had a chance to assess the matter. This claim may seem audacious from someone who has later fled. But in any event, the parliament of Australia could reasonably have concluded that illegal entrants who have received an administrative or lower court denials of their asylum claims are not thereafter likely to report for possible deportation after appeals are exhausted. This competence of the parliament does not preclude some limit, under the Covenant, on the ultimate length of time that unsuccessful asylum-seekers can be detained, where there is no possibility of their return to another country. Nor does it preclude some reasonable time limit on the decision of appeals, where the applicant is detained. But the author of this communication does not present such facts.

We may wish that the world had no borders, and that the conditions which give rise to legitimate asylum claims no longer existed. But especially in the present time we must recognize as well that States have a right to control entry into their own countries, and may use reasonable legislative judgements to that end.

(*Signed*): Ruth Wedgwood

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] We should not presume what the courts of the State party might decide in a particular case. A court's interpretation of parliamentary intent may be informed by Covenant norms, and the permissible inference that parliament would have wished to comply with the State party's treaty obligations. Accord *Young v. Australia*, Case No. 941/2000, Views adopted on 6 August 2003 (concurring opinion of R. Wedgwood).

[2] The author's claim seeking discretionary release might be deemed moot as well, due to his escape from custody.

DD. Communication No. 1020/2002, *Cabal and Pasini v. Australia*[*]
(Views adopted on 7 August 2003, seventy-eighth session)

Submitted by:	Mr. Carlos Cabal and Mr. Marco Pasini Bertran (represented by counsel Mr. John P. Pace and Mr. John Podgorelec)
Alleged victim:	The author
State party:	Australia
Date of communication:	6 July 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 August 2003,

Having concluded its consideration of communication No. 1020/2001, submitted to the Human Rights Committee on behalf of Mr. Carlos Cabal and Mr. Marco Pasini Bertran under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication, dated 6 July 2001, are Carlos Cabal, currently residing in Mexico, and Marco Pasini Bertran ("Pasini"), currently under detention in Port Philip maximum security prison awaiting extradition to Mexico. Both are Mexican citizens. They claim to be victims of violations of articles 7, 10, paragraphs 1 and 2 (a), and 14, paragraph 2, of the International Covenant on Civil and Political Rights, by Australia. They are represented by counsel.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to rule 85 of the Committee's rules of procedure, Sir Nigel Rodley did not participate in the adoption of the Views.

The text of an individual opinion signed by Committee member Mr. Hipólito Solari Yrigoyen is appended to the present document.

The facts as submitted by the authors

Extradition proceedings

2.1 On 11 November 1998,[1] the authors were arrested in Australia, pursuant to *provisional* arrest warrants issued under the Extradition Act 1988 ("Extradition Act"). They were taken before a magistrate and remanded in custody at the Melbourne Assessment Centre, Victoria, where they were segregated from convicted prisoners. On 4 January 1999, they were moved to Port Philip Prison, Victoria. They were held in a transit unit for three weeks, then placed in a unit with common prisoners, and in August 1999 were moved to the Sirius East high protection unit of Port Philip Prison. From the time the authors were detained at Port Philip Prison, they were neither *segregated* nor *treated separately* from convicted prisoners.

2.2 On 31 December 1998 and 11 February 1999, Mexico filed formal requests for the extradition of Cabal in respect of a number of alleged offences relating to the operation of a bank and other offences relating to fraud, tax evasion and money-laundering. On 20 January 1999, Mexico made a formal request for the extradition of Pasini in respect of two alleged offences relating to the operation of a bank and one of concealment. On 17 December 1999, a Magistrate of Australia found the authors eligible for surrender, and warrants were signed ordering their committal to Port Philip Prison. On 29 August 2000, the Federal Court of Australia dismissed the authors' application for judicial review of the extradition proceedings. The authors applied to the full court of the Federal Court to appeal this decision. On 18 April 2001, the full court dismissed their appeal. On 7 September 2001, the High Court dismissed an application by Pasini for special leave to appeal the decision of the full court of the Federal Court.

2.3 As of 20 December 2000, Pasini was granted bail several times until his return into custody on 19 July 2001 where he remains to date. On 4 July 2001, Cabal was granted bail by the High Court but this order was set aside on appeal on 2 August 2001. On the same day, Cabal notified the authorities that he no longer wished to avail himself of the remaining recourses open to him and that he accepted extradition and return to Mexico. On 6 September 2001, he was removed to Mexico.

2.4 On 22 May 2002, Pasini requested the Minister for Justice not to issue a surrender decision under section 22 of the Extradition Act until the outcome of his *amparo* proceedings in Mexico were known. The Minister acceded to this request. In a fax dated 9 February 2003, Pasini informed the Committee that, having exhausted all appeals in Australia in respect of Mexico's extradition request, he consented to extradition, and is currently awaiting surrender to Mexico. He remains in the Sirius East Unit of Port Philip Prison.

The prison conditions and treatment of the authors

2.5 Prior to his surrender, Cabal was held with convicted prisoners in the Sirius East high protection unit of Port Phillip maximum security prison. Pasini continues to be held with convicted prisoners in the same Unit. Port Philip is a privately operated prison, run by Group 4 Correction Services Pty Ltd. ("Group 4") and regulated by the law of the State of Victoria. The prison system in Victoria - unlike in the other states and territories of Australia - does not provide for the separate custody of persons held on remand without bail pending extradition proceedings.

2.6 According to the authors, the Sirius East Unit of the prison is populated with "convicted multiple murderers and rapists", and violence in the Unit is common. The inmates almost always have a history of violence and drug abuse. They have been described by one forensic psychologist as "perpetrators rather than victims". There is one prisoner in the Unit with AIDS, and up to 12 with Hepatitis C. Many of the prisoners suffer from communicable diseases and according to the authors in one affidavit by an inmate it is stated that as of 4 January 2000, the authors were detained with a prisoner who was "spitting blood".

2.7 There is a constant apprehension of violence and the authors refer to an affidavit of another inmate who describes various incidents in which he was sexually assaulted by other prisoners. The authors describe two incidents during which specific threats of violence were made against them. On 30 May 2000, Pasini, in the company of Cabal, was threatened with a 20 centimetre metal knife by a fellow inmate who was known for his history of drug abuse and violence. On 26 October 2000, in the exercise yard, two prisoners signalled that they wished to speak to Cabal and approached him. They were intercepted by prison officers who searched them, only to discover that one of them was carrying a pair of scissors.

2.8 The treatment afforded to the authors was, and with respect to Pasini is, not different or separate from that afforded to convicted prisoners. The following description of the treatment afforded to Pasini also applied to Cabal prior to his extradition. Pasini has a "Criminal Record Number" (CRN), which he is obliged to call out every time he is asked to identify himself. He is subjected to the same daily routine as convicted prisoners, including the same restrictions on everything, from physical contact with his family to the food he eats. During industrial relations disputes which result in strike action, the prison is run on skeleton staff. Consequently, all of the detainees in the prison are locked in their cells for 23 hours of the day, during which they have very little access to telephones. For this disturbance, convicted prisoners have their sentences reduced by approximately 1-2 days per day of strike action. In comparison, Pasini receives no compensation whatsoever.

2.9 Every time Pasini travels from the prison he is shackled and manacled with 12/17-link shackles. He is also strip searched after each visit, and before and after he is transported to court. This means that he may be subjected to a cavity inspection more than three times a day. Pasini is regularly subjected to pushing and shoving and general violence by prison officers.

2.10 On 17 December 1999, the authors were placed simultaneously in what is described as a "cage" for one hour. This was about the size of a telephone booth, triangular in shape with two solid walls and the third made of metal with small round holes. There is a small built-in chair but with two persons in it there is no room to sit.[2]

2.11 The authors state that the Courts have from time to time expressed serious concern about their situation but did not consider that their incarceration constituted circumstances that are sufficiently special, to warrant a bail decision in their favour.[3] They held that the risk of flight out-weighed the negative effects that this incarceration was having on the authors.

Attempts made by the authors to challenge their detention

2.12 On 8 November 1999, Cabal applied to the Federal Court for an interlocutory injunction restraining the Minister for Justice and Customs and the Director of Port Philip Prison from further keeping him in custody, pending consideration by the Federal Court of an appeal relating to extradition proceedings before the Federal Court.[4] This application was dismissed on 3 December 1999.

2.13 On 19 May 2000, the authors filed an application in the Supreme Court of Victoria for the issue of a writ of habeas corpus. On 30 May 2000, their application was dismissed. On 19 June 2000, they applied to the Federal Court of Australia for identical relief, claiming that their detention was in contravention of the Extradition Act. On 14 July 2000, the Court dismissed their application. On 28 July 2000, the authors appealed this decision to the full court of the Federal Court, which in turn dismissed the appeal. On 13 September 2000, the authors filed an application in the High Court of Australia for special leave to appeal from the judgement of the full court of the Federal Court. On 28 November 2000, this application was dismissed.

2.14 The authors attempted, through a motion dated 27 July 2000 to the Federal Court of Australia, to seek, inter alia, orders that they be released from prison and committed into the custody of the Australian Federal Police, the Victoria Police and/or the Secretary of the Department of Justice. On 11 August 2000, the court adjourned the Notice of Motion for a change of custody to a date to be determined. No further information is provided on the outcome of this motion.

2.15 On 8 March 2000, the authors lodged a complaint with the Human Rights and Equal Opportunity Commission ("HREOC"), complaining that their detention violated provisions of the International Covenant on Civil and Political Rights. On 9 November 2000, this Commission delivered its *Preliminary Findings* in which it found that the authors' detention violated their rights under articles 7, and 10, paragraphs 1, 2 (a), of the Covenant. On 23 October 2001, HREOC, after receiving additional submissions, released its final decision, finding that "the acts and practices complained of are not inconsistent with or contrary to a human right".

2.16 Since the start of the authors' detention, many letters have been written to the prison authorities on their behalf, requesting that their conditions of detention be improved.

The complaint

3.1 The authors claim that the State party has violated article 10, paragraph 2 (a), of the Covenant, by failing *to segregate* them from convicted persons, and failing to treat them *separately* in a manner appropriate to their status as unconvicted persons.[5] In this regard, they refer to the Standard Minimum Rules for the Treatment of Prisoners ("SMR") and Principle 8 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment ("Body of Principles"), which affirm the principle of segregation.

3.2 On the issue of *segregation*, the authors argue that the qualification of "save in exceptional circumstances" in article 10, paragraph 2 (a), was added for the benefit of impoverished countries who could not afford to build separate places of detention.[6] They refer to the Committee's general comment No. 21, in which it is stated that "… in order to emphasize their status as unconvicted persons who at the same time enjoy the right to be presumed innocent as stated in article 14, paragraph 2. The reports of States parties should indicate how the separation of accused persons from convicted persons is effected and explain how the treatment of accused persons differs from that of convicted persons".[7]

3.3 On the issue of *separate treatment*, the authors note that this element of article 10, paragraph 2 (a), is unqualified and unequivocally requires "separate treatment appropriate to their status as unconvicted persons".[8] They claim that "the conditions of detention of a person in preventative detention should be separate and distinct". They argue that such treatment should be consistent with the SMR (rules 85-93), which describes how to implement these rules, including providing access to doctors, dentists, and legal advisers.

3.4 The authors recall that Australia entered the following reservation to article 10:

> "In relation to paragraph 2 (a) the principle of segregation is accepted as an objective to be achieved progressively."

They observe that this reservation only relates to the element of *segregation* and that upon ratification of the Covenant, the State party accepted the obligation of ensuring *separate treatment* of convicted and unconvicted persons. They claim that as this reservation was entered 20 years ago, it is reasonable to expect that Australia would have achieved this objective to be in full compliance with its obligations, and argue that article 26 of the Vienna Convention on the Law of Treaties stipulates the principle of performance in good faith in carrying out obligations entered into by States. The authors claim that, on the contrary, the State party has taken a regressive approach at least in its application of the principle of segregation in its prison system in the State of Victoria. They argue that the Melbourne Remand Centre which, from 6 April 1989, facilitated the segregation of convicted and unconvicted persons, reversed this policy in 1994. They also argue that there has been no policy of segregation at Port Philip Prison, and that despite the State party's contention in its fourth report under article 40 of the Covenant,[9] examined in July 2000, that the Port Philip Prison would "allow for further improvement in the separation of convicted and unconvicted male prisoners", these intentions were not followed up.

3.5 The authors claim that the conditions under which Cabal was detained and Pasini continues to be detained violates their right to be treated with humanity and with respect for the inherent dignity of the human person, contrary to articles 7 and 10, paragraph 1.

3.6 It is claimed that, because Cabal was and Pasini continues to be treated in all respects as persons found guilty and serving a sentence, they have not been afforded the right to be presumed innocent until proved guilty according to law, contrary to article 14, paragraph 2 of the Covenant.

3.7 The authors claim that "their right to health is being put or exposed to serious jeopardy", by being detained with prisoners who suffer from communicable diseases. They make specific reference to the prisoner who was alleged to have been "spitting blood", a classic symptom of tuberculosis. The authors also refer to an article published in an international journal on the subject, where reference is made to the Baku Declaration on Tuberculosis, which issues a warning to governments and health authorities to take action to tackle the problem of tuberculosis in prisons. The authors claim that failing to address the problem would be in violation of article 12 of the Covenant on Economic, Social and Cultural Rights.

The State party's submissions on the admissibility and merits of the communication

4.1 By note verbale of 1 October 2002, the State party commented on the admissibility and merits of the communication. It provides general information on Port Philip Prison including the fact that it is the primary remand prison in the State of Victoria, that approximately 40-50 per cent of detainees are unconvicted remand prisoners, and that it performs a transit function in the Victorian corrections system. It submits that the Sirius East Unit houses prisoners who require protection from other prisoners within the prison. The unit contains convicted and unconvicted persons. It explains that both Cabal and Pasini were moved to Sirius East to ensure their safety, as they were believed to have been targeted for extortion in other parts of the prison and to have engaged in behaviour that put themselves at risk of becoming the victims of violent recrimination.[10]

4.2 The State party refers to the findings of the Working Group on Arbitrary Detention of the Commission on Human Rights, Opinion No. 15/29001 (Australia), of 18 May 2001, which concluded that the authors were not being arbitrarily detained and that the conditions of detention, alleged by the authors to pose a danger to their lives, was not a matter which fell within the mandate of the Working Group. It also referred to the urgent appeal sent to the State party by the Special Rapporteur against torture of the Commission on Human Rights on 12 June 2001.

4.3 The State party submits that the communication is inadmissible. It argues that the authors have not submitted to the Committee any material they did not already present to HREOC, which concluded in its final report of 23 October 2001 that the State party had not breached any of their rights under the Covenant. The alleged violations of the Covenant, save for the currently alleged violation of article 14, paragraph 2, are identical both in the case before HREOC and the case now before the Committee. It argues that the Committee's findings in the case of *F, on behalf of her son, C. v. Australia*[11], indicate that where HREOC has concluded that an author's allegations and evidence do not reveal a violation of the Covenant, and where the author has failed to provide the Committee with information supplementary to that provided to HREOC, the communication to the Committee should be held inadmissible for lack of substantiation.

4.4 The State party submits that, on account of its pertinent reservation, the allegation of a violation of article 10, paragraph 2 (a), for failure of the State party to *segregate* the authors from convicted prisoners is inadmissible *ratione materiae*. It argues that at the 13th session of the Third Committee of the General Assembly, the practical implications of article 10, paragraph 2 (a), were considered to be of concern to a number of States. In fact, "Doubt was expressed by some representatives about the practical possibility in many countries of always segregating accused persons from convicted persons as required in paragraph 2 of the article".[12] There have been no objections to Australia's reservation, and it is in accordance with the Committee's guidelines on reservations as set out in general comment No. 24.[13] The State party argues that article 19 (3) of the Vienna Convention on the Law of Treaties provides that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation, provided it is not incompatible with the object and purpose of the treaty. The Covenant neither prohibits reservations generally nor mentions any type of permitted reservation.

4.5 The State party provides the following information on the factual circumstances surrounding the progressive implementation of segregation in prisons in the State of Victoria. A new 600-bed metropolitan Melbourne Remand Prison and a 300-bed metropolitan medium security prison will be completed in late 2004. The final location of these new correctional facilities has yet to be finalized. It refers to the explanation by the then Correctional Services Commissioner of Victoria to HREOC: "Victoria is not currently in a position to separate convicted from unconvicted prisoners. In 1989, the Melbourne Remand Centre was constructed to house all remand prisoners but within six weeks of opening, it was at full capacity, and additional remand prisoners had to be accommodated at the reception prison at Coburg … . There is significant pressure on prison accommodation in Victoria. This situation is not confined to this state. While ideally sentenced and remand prisoners would be separated, in practical terms the needs of all detainees must be considered … to separate remand and sentenced prisoners in all cases would essentially require a duplicated prison system with all tiers of security and special needs facilities available for remand prisoners … . [I]t balances this objective [segregation] with other factors that directly and immediately impact on the safe custody and welfare of individual prisoners and the prison population generally … . Placement decisions are reviewed periodically. These considerations must be made within the context of a prison system operating at maximum capacity …".

4.6 For the State party, the fact that segregation has not been achieved does not amount to a violation of article 10, paragraph 2 (a). Progressive realization does not mean "purely linear progress". Circumstances may arise where progress is halted and indeed reversed where, for example, budgetary constraints may make it necessary to use what was formerly a remand centre for unconvicted persons as a centre to house convicted and unconvicted persons. Temporary regression does not mean that segregation is not being achieved progressively. The State party refers to the submission of the Correctional Services Commissioner of Victoria to HREOC who argued that "merely to say (as the complainants do) that the reservation was made 20 years ago and should therefore have been achieved is to discount the challenges (such as the expanding prison population and the change in characteristics of those detained) that have faced correctional management in the last 20 years". The State party recalls the Committee's jurisprudence on the requirement of segregation under article 10, paragraph 2 (a), of the Covenant but concludes that such jurisprudence is not applicable given its reservation to article 10.

4.7 On the claim that Cabal's right to be presumed innocent was violated and Pasini's identical right is being violated, the State party submits that article 14, paragraph 2, only applies to persons facing criminal proceedings.[14] Although the authors had been charged with criminal offences by Mexico, they were at no time facing criminal proceedings under Australian law. Under Australian law, extradition proceedings are not criminal proceedings, and Australian courts have at no time ruled on the guilt or innocence of the authors. Rather, they have only come to a determination on whether or not they could be extradited in accordance with the Extradition Act. The State party, therefore, submits that there is no issue arising under the Covenant in relation to any presumptions afforded to the authors under Australian law. Accordingly, this part of the communication is inadmissible *ratione materiae*.

4.8 The State party does not concede that the authors' detention may have made them appear to be guilty and submits they provided no evidence that their right to be presumed innocent was neglected by any Australian court or official. It submits, therefore, that the authors have failed to substantiate this claim.

4.9 On the authors' claim that their right to health is put in jeopardy, the State party notes that the authors do not relate this allegation to any right protected under the Covenant. It submits that there is no Covenant article which protects the right to health and that therefore an alleged violation of this right is inadmissible *ratione materiae*. Should the Committee decide to interpret a Covenant provision as protecting the right to health, the State party reserves the right to make submissions prior to the Committee's final determination of the matter. In addition, the State party submits that the authors have not demonstrated how they are victims of an alleged violation of their right to health, and provides detailed information on disease control in Port Philip Prison. In particular, it submits that the authors have not shown that they are at a real risk of contracting any diseases that other prisoners may have.

4.10 With respect to the authors' claim that the State party has contravened the Vienna Convention on the Law of Treaties, the State party submits that this claim is inadmissible as the Committee is only mandated to consider alleged violations of the Covenant and not any other international instrument.

4.11 On the merits, and with respect to the issue of *separate treatment* and the authors' reference to the SMR and Body of Principles, the State party argues that these principles are not legally binding, and therefore a failure to implement all of the recommendations therein does not in and of itself indicate a violation of article 10, paragraph 2 (a). It refers to the 1958 report of the Third Committee of the General Assembly which made it clear that the SMR, although an interpretative tool, does not bear any formal relationship to the Covenant.[15] It also refers to the SMR themselves which are prefaced with qualifications that imply that they are neither binding nor conclusive of prisoner rights. Also, the United Nations Special Rapporteur on torture has explained that "The SMR is not per se a legal instrument, since ECOSOC has no power to legislate. Even when the General Assembly urges the implementation of the SMR, it does not do so in such a way as to suggest that its pertinent resolutions are anything more than political or moral recommendations."[16]

4.12 The State party submits that the authors were afforded *separate treatment* sufficient to meet Australia's obligations under article 10, paragraph 2 (a). It argues that the authors were afforded the majority of the elements of *separate treatment* of unconvicted persons suggested in the SMR and Body of Principles including, access to legal advisers, visits from family, right to wear their own clothes, housing in individual cells with their own bathroom facilities, access to their own doctors, right to purchase newspapers and books, and the opportunity, if they so chose, to work. It supports its argument by referring to the final report of HREOC, which stated, inter alia, that "Mr. Cabal has made in excess of 2,600 telephone calls and Mr. Pasini has made in excess of 1,600 telephone calls."[17]

4.13 On the allegation that Cabal's right to be presumed innocent was violated and Pasini's identical right is being violated, the State party submits that separate treatment was and is granted, in part, in recognition of the authors' status as unconvicted persons not facing criminal charges under Australian law. Therefore their detention would not have given the impression that they were guilty. The State party reiterates its arguments on admissibility, and submits that even if the authors were held in conditions that implied their guilt, there would have been no effect on the outcome of the actual criminal charges facing them in Mexico.

4.14 The State party denies that the authors were subjected to treatment in violation of articles 7 or 10, paragraph 1, of the Covenant. It submits that, insofar as the authors allege that acts of other prisoners violate articles 7 or 10, paragraph 1, these acts, not being committed by State agents, cannot be attributed to Australia. It then refers to the final report of HREOC, dated 23 October 2001, which found that there had been no breach of either of these articles. On the authors' allegations to HREOC concerning their general conditions of detention, including the lack of adequate access to library and recreational activities, inadequate visiting rights, the nature of the work available, the difficulties in making overseas calls to lawyers and family and in having access to their own food, the State party notes the findings of HREOC that article 10, paragraph 1, would involve harsher conditions than those complained of and would not extend to cover the hardships or constraints that result from the deprivation of liberty.

4.15 On the issue of shackling, the State party submits that the SMR and Body of Principles may be used as a guide to the interpretation of article 10, paragraph 2:

Rule 33 provides that:

> "… instruments of restraint shall not be used except in the following circumstances:
> (a) As a precaution against escape during a transfer, provided that they shall be removed before a judicial or administrative authority."

Rule 34 further provides that:

> "The patterns and manner of use of instruments of restraint shall be decided by the central prison administration. Such instruments must not be applied for any longer time than is strictly necessary."

4.16 The State party submits that the authors were shackled during transport to and from court hearings, as a result of being placed on the high security escort list because of a presumed flight risk. It refers to the submission of the then Commissioner for Correctional Services to HREOC, who explained that the assessment of the authors flight risk was made because they had: in the past evaded arrest through the use of false travel and identity documents; had access to considerable financial resources; had made payments to other prisoners; and prison intelligence had reported incidents of other prisoners offering to assist any escape in return for financial payment. The State party also refers to the comments made by a judge quoted in the HREOC report who had argued that there was a substantial risk of the authors absconding if released on bail.

4.17 The State party quotes from the final report of HREOC on the nature of the restraints used, "It is acknowledged that a 12-link shackle was used on the complainants during transport. However, since 7 January 2000, only 17-link shackles have been used. Seventeen-link shackles provide for more leg movement for entry into the van and in general. Escort officers assist prisoners taking steps into the transport van by supporting the belt that is placed on the prisoners … ." The State party also quotes the conclusion drawn on this issue by HREOC: "… the decision to shackle the prisoners during transport was taken by the Governor in charge of SESG in response to an assessment made that the complainants were a flight risk. The decision was confirmed by the Correctional Services Commissioner on review. The shackling is only used in connection with transportation. It is unfortunate that the Governor has assessed that such restrictive restraints should be applied to the complainants. However, in the circumstances I am of the view there is no breach of articles 10 (1) or 7 in relation to the issue of shackling".

4.18 On the issue of the detention of the authors in a "cage", HREOC received evidence that the authors had been detained for an hour in the holding cell in question as it was the only one available in the custody centre at that time that could accommodate both prisoners (maximum security prisoners normally being held individually). They had refused the option of being placed in separate single cells, wanting to be placed together. They could stand or sit in the cell, at worst in the alternative, and chose to stand. While there may have been discomfort, it was for a limited period and any physical or mental suffering (of which there was no evidence) was only of a temporal and minimal nature. In its findings on these submissions, HREOC considered that, even accepting that the cell was small and uncomfortable, placement therein for such a short and temporary period could not, having regard to jurisprudence, be said to amount to a breach of articles 7 or 10 of the Covenant.

4.19 On the issue of strip and cavity searching, the State party explains the procedure governing the searching of detainees as set out in the Operations Manual for each prison. The search procedure, conducted by two staff members of the prisoner's sex, is first explained to the prisoner. The search takes place in a dry, warm location, out of the sight of other persons, with a floor covering provided to stand on if the floor is not carpeted. The prisoner, fully clothed, may be asked to open his mouth, raise his tongue and remove any dentures, for a purely visual inspection. The prisoner's clothing is checked; in underclothes, the prisoner is asked to raise his arms so that the top half of his body can be examined purely visually. Upon removing underclothes, the lower areas of the body are also examined purely visually. Finally, the prisoner is asked to lift his feet for an inspection of the soles. The overall time taken is kept as short as possible.

4.20 The State party quotes from the final report of HREOC which states that "… it would seem that these type of searches [strip and cavity searches] are an inevitable incident of the complainants being incarcerated in a prison. The purpose of these searches is to deter and detect the movement of unlawful drugs into the prison. Entry of drugs through the visitor reception area is of particular concern, hence the requirement that a search is conducted at the conclusion of each visit. I note that the cavity searches are visual inspections and that there is no physical intrusion". It concluded that "Having accepted that the searches are necessary for the proper and secure running of the prison and thus would seem an inevitable consequence of imprisonment I am of the view that the requirement for the complainants to undergo the searches does not breach articles 10 (1) or 7 of the ICCPR …". The State party submits that the authors were not singled out for searches, the searches were carried out in a manner designed to minimise the embarrassment to them, and were carried out only to ensure the safety and security of the prison.

4.21 The State party contests the view that there was or is a risk to the authors' physical and mental health resulting from detention. It submits that the allegation that Pasini was threatened with a 20 centimetre metal knife by a fellow inmate was investigated and found not to be substantiated. However, in the interests of the author's safety, the Director of Sentence Management moved the alleged attacker to another prison. It also submits that the affidavit, to which the authors refer, as attesting to the sexual assault of an inmate of Sirius East is unsubstantiated and that the person who made the affidavit has been unwilling to cooperate with a police inquiry.

4.22 Although the State party does not consider that any Covenant provision relates to the right to health, it does provide the following information on the merits of this claim at this point. The State party denies that the prisoner spitting blood suffered from tuberculosis. It submits that prisoners with tuberculosis in Port Philip are segregated in the in-patient facility, St. Johns unit. A response from Group 4, which the State party directs the Committee to consider as part of its submission, confirms the State party's explanation. It submits that the best practice within correctional institutions is for prisoners with AIDS to be integrated in the general prison population. All prisoners, regardless of their impairment, are to be treated equally and it would be contrary to the Victorian Equal Opportunity Act to act otherwise. Given that it is not a requirement for prisoners to declare their HIV status on reception into Port Phillip Prison and given that there is no requirement that prisoners be tested for HIV on arrival, Group 4 submits that it would not be possible to maintain a segregation policy with respect to HIV/AIDS sufferers in any event.

Comments by the authors

5.1 By letter of 28 January 2003, the authors responded to the State party's submission. They contest the view that the communication is inadmissible and argue that the Committee's findings in the case of *F, on behalf of her son, C. v. Australia*,[18] are not applicable to the facts of the communication.

5.2 The authors consider that the intervention of the Special Rapporteur on torture is important as the information was compelling enough to warrant the despatch of an urgent appeal to the State party. They reiterate their claim made before the Working Group on Arbitrary Detention, that it was the procedure itself by which they were transferred from the common prisoners unit to the high protection unit of Sirius East, that they alleged was arbitrary, as they had no opportunity to contest the reasons behind the decision. According to the authors, the Courts cannot review this procedure as they may only consider whether such detentions accord with the Extradition Act.

5.3 The authors recall that the State party's fourth report to the Committee specifically stated that "[T]he Prison at Laverton will house the majority of male remand prisoners and will allow for further improvement in the separation of convicted and unconvicted male prisoners."[19] This prison is Port Philip Prison which, according to the authors, could be used and was supposed to be used for the purpose of segregating convicted and unconvicted persons, including the authors, but fails to do so for policy reasons. Thus, the State party had the means and facility to accommodate the authors in a manner consistent with the provisions of article 10, paragraph 2 (a).

5.4 The authors contest the State party's argument that there were no objections to the reservation to article 10, paragraph 2 (a), and submit that the Netherlands expressed its "misgivings" about this reservation. They argue that in considering the extent and scope of the reservation, it is necessary to look at the State party's intention when making it and to take into account the Committee's Views in general comment No. 24, that reservations are the exception, that acceptance of the full range of obligations in the Covenant is the rule, and that they should be withdrawn at the earliest possible moment. The authors argue that since segregation is accepted as an objective to be achieved progressively it is inconsistent with the reservation to place inmates according to "management needs rather than sentencing status", as stated by the Corrections Commissioner,[20] when the facilities actually exist to house them separately.

According to the authors, the current practice of non-segregation in the state of Victoria results from a policy introduced since the reservation was made, a policy deemed inconsistent with the intention expressed in the reservation itself and the principles set out in the general comment.

5.5 The authors refer to the decision of HREOC which it submits is not binding on either the State party or the Committee. They do emphasise that although HREOC did not find any violations of the Covenant, it did not dispute the facts submitted by the authors, including the fact that they were subjected to threats of violence, the use of shackles and manacles, and strip and cavity searches, and that they were neither segregated from nor treated separately to convicted prisoners. The authors analyse the decision of HREOC inasmuch as it refers to the evaluation of facts and evidence of the case, to support of their argument that the Commissioner erred in his decision.

Supplementary submissions by the parties

6.1 By note verbale of 24 April 2003, the State party made supplementary submissions concerning the status and effect of its reservation to article 10, paragraph 2, of the Covenant, and reiterated its earlier arguments on this issue.

6.2 A further note verbale was submitted by the State party on 22 July 2003. In light of the draft Views before it, prepared by its pre-sessional Working Group, the Committee decided that the State party's late submission had no bearing on the declarations of the Committee.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant. The Committee has ascertained that the same matter is not being examined under another international procedure of international investigation or settlement.

7.2 Prior to considering the admissibility of the individual claims raised, the Committee must consider whether the State party's obligations under the Covenant apply to privately-run detention facilities, as is the case in this communication, as well as State-run facilities. While this is not an argument put forward by the State party, the Committee must consider ex officio whether the communication concerns a State party to the Covenant in the meaning of article 1 of the Optional Protocol. It recalls its jurisprudence in which it indicated that a State party "is not relieved of its obligations under the Covenant when some of its functions are delegated to other autonomous organs".[21] The Committee considers that the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under the Covenant, notably under articles 7 and 10 which are invoked in the instant communication. Consequently, the Committee finds that the State party is accountable under the Covenant and the Optional Protocol of the treatment of inmates in the Port Philip Prison facility run by Group 4.

7.3 The Committee notes that the State party has invoked its reservation to article 10, paragraph 2 (a), of the Covenant which states that, "In relation to paragraph 2 (a) the principle of segregation is an objective to be achieved progressively." Also, the Committee notes the authors' argument that despite the reservation this part of the communication is admissible as the reservation was made 20 years ago and it would be reasonable to expect that the State party would have fulfilled its objective to comply fully with its obligations under this article at this stage. Further, the Committee notes that both parties have made reference to the Committee's general comment No. 24 on reservations.

7.4 The Committee observes that the State party's reservation in question is specific and transparent, and that its scope is clear. It refers to the *segregation* of convicted and unconvicted persons and does not extend, as argued by the authors and not contested by the State party, to cover the *separate treatment* element of article 10, paragraph 2 (a) as it refers to these two categories of persons. The Committee recognizes that while 20 years have passed since the State party entered the reservation and that it intended to achieve its objective "progressively", and although it would be desirable for all States parties to withdraw reservations expeditiously, there is no rule under the Covenant on the time frame for the withdrawal of reservations. In addition, the Committee notes the State party's efforts to date to achieve this objective with the construction of the Melbourne Remand Centre in 1989, specifically for the purpose of housing remand prisoners, and its plan to construct two new prisons in Melbourne, including a remand prison, by end 2004. Consequently, although it may be considered unfortunate that the State party has not achieved its objective to *segregate* convicted and unconvicted persons in full compliance with article 10, paragraph 2 (a), the Committee cannot find that the reservation is incompatible with the object and purpose of the Covenant. This part of the authors' claim is, therefore, inadmissible under article 3 of the Optional Protocol.

7.5 As to the remaining part of the authors' claim under article 10, paragraph 2 (a) of the Covenant that the State party failed to treat the authors *separately* in a manner appropriate to their status as unconvicted persons, the Committee notes that in many respects the authors were provided with separate treatment in relation to such privileges as the right to wear their own clothes, making telephone calls and being permitted to eat their own food. The Committee takes the view that the authors have not substantiated, for purposes of admissibility, that the matters in which they were treated similarly to convicted prisoners would either not be compatible with their status as persons detained pending extradition procedures, or raise any issues separate from the lack of *segregation*, a matter covered by the reservation by the State party. Consequently, the Committee finds this part of the authors' claim inadmissible under article 2 of the Optional Protocol.

7.6 With respect to the claim that the authors' right to be presumed innocent was violated by not segregating or treating them separately from convicted prisoners, the Committee recalls article 14, paragraph 2, only relates to individuals charged with a criminal offence. As the authors were not charged by the State party with a criminal offence, this claim does not raise an issue under the Covenant and the Committee, therefore declares it inadmissible *ratione materiae* under article 3 of the Optional Protocol.

7.7 With respect to the authors' claim of a violation of their right to health, the Committee shares the State party's view that there is no such right protected *specifically* by provisions of the Covenant. The Committee considers that a failure to separate detainees with communicable diseases from other detainees could raise issues primarily under articles 6, paragraph 1, and 10, paragraph 1.[22] However, in the instant case the Committee considers that the authors have failed to substantiate their claim, which is therefore inadmissible, under article 2 of the Optional Protocol.

7.8 With respect to the authors' new claim (see paragraph 5.2) that the decision to transfer them from the unit with common prisoners to the high protection unit of Sirius East was arbitrary, as the authors could neither contest nor have reviewed the reasoning for such a transfer by a court, the Committee notes that the authors, who were detained under the Extradition Act, filed several habeas corpus applications while detained at Sirius East. The Committee notes that the authors have failed to substantiate, for purposes of admissibility, what separate issue under the Covenant would arise due to the alleged arbitrariness. Consequently, this claim is inadmissible under article 2 of the Optional Protocol.

7.9 The Committee finds no obstacles to the admissibility of the claims of a violation of articles 7 and 10, paragraph 1. These claims should be considered forthwith on the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 With respect to the claim that the State party violated articles 7 and 10, paragraph 1, because of prison conditions and the treatment to which the authors were subjected, the Committee notes that the allegations of shackling the authors with 12 link shackles, subsequently replaced by 17 link ones during transport to and from prison, and of having stripped and subjected them to cavity searches after each visit, are factually uncontested by the State party. However, the State party has provided justification for the treatment in question, explaining that the assessment of the authors flight risk was made because they had in the past evaded arrest through the use of false travel and identity documents, that they had access to considerable financial resources; had made payments to other prisoners, and that prison intelligence had reported incidents of other prisoners offering to assist any escape in return for financial payment. Also, the State party has explained that the authors were not singled out for searches but that the searches were carried out in a manner designed to minimise the embarrassment to them, and were carried out only to ensure the safety and security of the prison. In the assessment of the Committee, there has been no violation of article 7 or article 10, paragraph 1, in these respects.

8.3 As to the issues raised by the authors' detention for an hour in a triangular "cage", the Committee notes the State party's justification that this holding cell was the only one capable of holding two persons at the time, and that the authors requested to be placed together. In the Committee's view, a failure to have a cell sufficiently adequate to hold two persons is insufficient explanation for requiring two prisoners to alternately stand and sit, even if only for an hour, within such an enclosure. In the circumstances, the Committee considers this incident to disclose a violation of article 10, paragraph 1, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Australia of article 10, paragraph 1, of the International Covenant on Civil and Political Rights.

10. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the authors are entitled to an effective remedy of compensation for both authors. The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] According to the State party, warrants were issued for Cabal on 11 November 1998, and for Pasini on 27 November 1998.

[2] The authors do not state why they were held in this "cage". In its findings of fact, the Human Rights and Equal Opportunity Commission stated that "they were placed in a small triangular cell at the Melbourne Custody Centre on 17 December 1999".

[3] The authors refer to remarks made by judges in the cases of *Cabal v. United Mexican States*, an unsuccessful bail application, and *Cabal and Pasini v. Secretary, Department of Justice (Victoria) and Lisa Hannon*, a habeas corpus application.

[4] *Peniche v. Vanstone* [1999] FCA 1688.

[5] Although the authors were neither segregated nor treated separately from convicted prisoners from the time they were detained in Port Philip Prison, their complaint relates to the period of detention in the Sirius East Unit of Port Philip Prison from August 1999 to 6 September 2001 with respect to Cabal and August 1999 to date with respect to Pasini.

[6] The authors refer to the commentary on the Covenant by M. Nowak and the "Guide to the Travaux Préparatories" by M. Bossuyt.

[7] General comment No. 21, replaces general comment No. 9 concerning humane treatment of persons deprived of liberty, article 10, forty-fourth session, 1992.

[8] The authors refer to the Committee's jurisprudence in *Berry v. Jamaica,* Case No. 330/1998, Views adopted on 7 April 1994 and *Griffin v. Spain*, Case No. 493/1992, Views adopted on 4 April 1995.

[9] CCPR/C/AUS798/4: Australia 4/8/99.

[10] The State party refers to the explanation provided by the Head of Operations in a letter dated 6 August 1999 to the Assistant Manager Sentence Management "… Prisoners in Pencihe's Unit, Scarborough South, claim that he [Cabal] cannot continue to do what he is doing to fellow prisoners [promising to provide them with money and then not doing so], and that the time is quickly arriving when he will be severely assaulted, or worse. Prisoners have stated that whilst he has been accommodated in Scarborough South, he has been looked after, and has not readily associated with other prisoners. But the prisoners stressed that they believe he will be assaulted in the near future … . I firmly believe that prisoners have reached the point of enough talking, and physical response is the only method in which they wish to deal with this matter …".

[11] Communication No. 832/1998, Decision adopted on 25 July 2001.

[12] The State party refers to M. Bossuyt, Guide to the "*Travaux Préparatoires*" of the International Covenant on Civil and Political Rights (1987), p. 226.

[13] HRI/GEN/1/Rev.4.

[14] The State party refers to *Morael v. France,* Case No. 207/1986, Views adopted on 28 July 1989; *WJH v. The Netherlands,* Case No. 408/1990, Decision adopted on 22 July 1992; *WBE v. The Netherlands,* Case No. 432/1990, Decision adopted on 23 October 1992.

[15] The State party refers to M. Nowak, United Nations Covenant on Civil and Political Rights: CCPR Commentary (1993), p. 185.

[16] N. Rodley, *The Treatment of Prisoners under International Law* (1999) (2nd edition), pp. 280-281.

[17] The State party also refers to the submission from Group 4 which provides similar information and which the State party includes as part of its submission. Apart from that already mentioned by the State party, the Group 4 submission states that on numerous occasions the authors were accommodated with special requests over and above the services and facilities ordinarily provided to prisoners, including being allowed social visits in addition to the maximum number of visits permitted to other prisoners and a range of food which reflected their Mexican origin.

[18] Supra.

[19] Supra.

[20] The authors refer to a letter of 28 June 2000 from the then Correctional Services Commissioner, addressed to the Human Rights Commissioner.

[21] *B.d.B. v. The Netherlands*, Case No. 273/88, Decision of 30 March 1989, and *Lindgren et al. v. Sweden*, Case No. 298-299/88, Views adopted on 9 November 1990.

[22] *Lantsova v. The Russian Federation*, Case No. 736/1997, Views adopted on 26 March 2002.

APPENDIX

Individual opinion by Committee member Mr. Hipólito Solari Yrigoyen (dissenting)

I disagree with the present communication on the grounds set forth below:

With regard to the claim that the State party violated articles 7 and 10, paragraph 1, because of the prison conditions and treatment to which the authors were subjected and because, every time Pasini leaves the prison, he is shackled with 12 to 17 link shackles and, after each visit, he is stripped and searched, as he is before and after every time he is taken to court; and that this means he may be subjected to cavity searches more than three times a day and has to put up with the pushing and shoving and general violence of the prison guards, the Committee takes note of the fact that the State party has not contested any of these facts. It has, however, tried to justify them on the grounds that Pasini might be a flight risk. The Committee understands that the State party has ways and means of preventing a flight risk without using humiliating and unnecessary methods that are incompatible with respect for the inherent dignity of the human person and the treatment to which anyone deprived of his liberty is entitled. The Committee therefore considers that there has been a violation of articles 7 and 10, paragraph 1, of the Covenant.

(*Signed*): Hipólito Solari-Yrigoyen
8 August 2003

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

EE. Communication No. 1077/2002, *Carpo et al. v. The Philippines** (Views adopted on 28 March 2003, seventy-seventh session)

Submitted by:	Jaime Carpo, Oscar Ibao, Warlito Ibao and Roche Ibao (represented by counsel, Mr. Ricardo A. Sunga III)
Alleged victim:	The authors
State party:	The Philippines
Date of communication:	6 May 2002

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 2003,

Having concluded its consideration of communication No. 1077/2002, submitted to the Human Rights Committee on behalf of Mr. Jaime Carpo, Mr. Oscar Ibao, Mr. Warlito Ibao and Mr. Roche Ibao under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication, dated 6 May 2002, are Jaime Carpo, his sons Oscar and Roche Ibao, and his nephew Warlito Ibao, all Filipino nationals detained at New Bilibid Prison, Muntinlupa City. The authors claim to be victims of violations by the Philippines of articles 6, paragraph 2, and 14, paragraph 5, of the Covenant. The authors are represented by counsel. The Covenant entered into force for the State party on 23 January 1987, and the Optional Protocol on 22 November 1989.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castllero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The texts of two individual opinions signed by Committee members Mr. Nisuke Ando and Ms. Ruth Wedgwood are appended to the present document.

1.2 On 14 May 2002, the Human Rights Committee, acting through its Special Rapporteur on new communications, requested the State party pursuant to rule 86 of its rules of procedure not to carry out the death sentence against the authors whilst their case was before the Committee.

The facts as presented

2.1 Prior to 1987, the death penalty existed in the Philippine legal system, with numerous crimes, including murder, that were punishable by death. On 2 February 1987, a new Constitution took effect following approval by the Filipino people consulted by plebiscite. That Constitution, in article 3 (19) (1), abolished the death penalty in the following terms:

> "Executive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall the death penalty be imposed, unless for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua."

2.2 On 13 December 1993, the Philippine Congress, by way of Republic Act No. 7659, re-introduced the death penalty by electrocution in respect of "certain heinous crimes", including murder in various circumstances.[1] The substance of the offence of murder remained unchanged.

2.3 In the evening of 25 August 1996, a grenade was hurled into the bedroom of the Dulay family. The explosion killed Florentino Dulay, as well as his daughters Norwela and Nissan, and wounded a further daughter, Noemi. On 25 October 1996 and 9 December 1996, the authors Jaime Carpo and Roche Ibao, respectively, were arrested. Thereupon, the remaining authors Oscar and Warlito Ibao gave themselves up.

2.4 On 22 January 1998, the Regional Court of Tayug, Pangasinan, convicted the authors of "multiple murder with attempted murder", sentenced them to death and fixed the sum of civil liability at P600,000. On 4 April 2001, on automatic review of the authors' case, a 15 judge bench of the Supreme Court affirmed the conviction after extensive review of the facts, and reduced the civil liability to P330,000. As to the sentence of death, the Court considered the case to fall within article 48 of the Revised Penal Code, according to which the most serious penalty for the more serious of several crimes had to be imposed.[2] As the maximum penalty for the most serious crime committed by the authors, i.e. murder, was death, the Court considered article 48 applied, and required the death penalty. The judgement also noted that while four justices of the court maintained their position that the Republic Act No. 7659, insofar as it prescribed the death penalty, was unconstitutional, those justices submitted to the majority ruling of the Court that Republic Act No. 7659 was constitutional, and accordingly that the death penalty should be imposed in the authors' case.

2.5 The Supreme Court also ordered that the complete records of the case be forwarded to the Office of the Philippine President for possible exercise of executive clemency. To date, the President has not granted any form of executive clemency.

The complaint

3.1 The authors argue that re-imposition of the death penalty and its application to them is inconsistent with the first sentence of article 6, paragraph 2, permitting the imposition of the death penalty in States "which have not abolished the death penalty". Furthermore, the authors argue that as "murder" was not punishable by death before the re-introduction of the death penalty, it cannot constitute a "most serious crime" (to which article 6, paragraph 2, permits application of the death penalty) after the re-introduction of the death penalty, when the offence of murder remained otherwise wholly unchanged in terms of its substantive definition.

3.2 As to the complaint under article 14, paragraph 5, the authors contend that, under the automatic review procedure, they received "no real review in the Supreme Court". They claim that they had "no real opportunity to be heard", since the Court did not allow any oral argument and "practically foreclosed the presentation of any new evidence". Therefore, according to the authors, the automatic review by the Supreme Court was neither genuine nor effective in enabling a determination of the sufficiency, or soundness, of the conviction and sentence.

3.3 The authors state that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

The State party's submissions on admissibility and merits

4.1 By submission of 8 July 2002, the State party argued that the communication was unsubstantiated and inadmissible in respect of all claims advanced.

4.2 Concerning article 6, paragraph 2, the State party considers the argument advanced to be "a normative one" that cannot be considered by the Committee. It is said to be purely an argument on the wisdom of imposing the death penalty for certain offences, while the determination of which crimes should so qualify is purely a matter of domestic discretion. According to the State party, the Covenant does not purport to limit the right of the State party to determine for itself the wisdom of a law that imposes the death penalty. The State party contends that the constitutionality of the death penalty law was a matter for the State party itself to decide, and noted that its Supreme Court had upheld the constitutionality of the law in question.[3] The State party further argues that it does not fall to the Committee to interpret a State party's constitution for purposes of determining that State party's compliance with the Covenant.

4.3 The State party distinguishes between States that presently have death penalty laws and those that have re-imposed the death penalty after abolition or suspension. It points to the specific provision in the constitutional article abolishing the death penalty that provides for the possibility of Congress to re-impose it. The Covenant does not prevent such a re-imposition, for article 6, paragraph 2, refers simply to countries that have existing death penalty statutes. The requirement of the Covenant is rather that the death penalty be imposed following strict respect for due process rules. In this case, there is no argument that the State party has failed to comply with its own domestic processes.

4.4 Concerning the authors' argument that the death penalty was imposed for crimes that are not the "most serious", the State party notes that States have a wide discretion in interpreting this provision in the light of culture, perceived necessities and other factors, as the notion "most serious crimes" is not defined any more explicitly in the Covenant. The State party finds fallacious the authors' reasoning that as the death penalty could not be imposed on *any* crime before re-imposition, no crime could be deemed a "most serious" one that could be punished by the death penalty after re-imposition - the crime of murder remained, and remains, amongst the most serious in the domestic order, including as measured by gravity of possible punishment then available.

4.5 As to article 14, paragraph 5, the State party rejects the author's arguments, for each person sentenced to death automatically receives an appeal. Moreover, the failure to grant a hearing on oral argument does not indicate lack of genuine review, for the long-standing practice of the Court is only to hear oral argument in cases presenting novel questions of law. As to executive clemency, the State party notes that, under its law, this prerogative remains within the purely discretionary power of the President. While any such request for clemency will be received and acted upon, the substance of the outcome remains within the President's discretion.

The author's comments

5.1 By letter of 24 November 2002, the authors responded to the State party's submissions. They observe that by becoming party to the Covenant and the Optional Protocol, the State party accepted the ability of the Committee to assess whether its actions are consistent with the provisions of those instruments. By reference to article 6, paragraph 6, of the Covenant, the authors identify an "abolitionist stance" in the Covenant that does not envisage a retreat from abolition, as made by the State party. As to the State party's alleged discretion to determine the content of the notion of "most serious crimes", the authors note that international consensus restricts these to crimes not going beyond intentional crimes with lethal or other extremely grave consequences.[4] The authors note, by contrast, that the lengthy list of offences punishable by death in the State party includes such crimes as kidnapping, drug-related offences, plunder and qualified bribery.

5.2 Regarding article 14, paragraph 5, the authors note that the absence of oral argument in the authors' case prevented the Supreme Court from making its own assessment of witness testimony and required it to rely on the assessment of the lower court. The authors argue that no effective review is possible where the Court has to weigh the credibility of the accused against that of the victim without being able to hear the testimony of key witnesses.

5.3 The authors refer to subsequent developments, including a newspaper article, suggesting that even though the President had in early October 2002 announced a ban on executions until further notice in order to provide the Congress with an opportunity to pass abolition legislation, preliminary preparations for the authors' execution had already been taken. While the President had recently granted reprieves to some convicts scheduled for execution, to date the authors had not received any such notice. Additionally, execution of the authors would appear to be unlawful under domestic law, as it would come after the 18-month period prescribed by law as the maximum time that may elapse without execution after judgement has become final.

Subsequent exchanges with the parties

6.1 Despite invitations to do so by reminders of 27 November 2002 and 8 January 2003, the State party has not added further submissions on the merits to those supplied concerning admissibility.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes that the State party's only contention as to the admissibility of the authors' claims is that they are unsubstantiated, in the light of a variety of argumentation going to the merits of the claim. Accordingly, the Committee considers it more appropriate to deal with the issues raised at that point. In the absence of any further obstacles to admissibility, therefore, the Committee finds the authors' claims admissible.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

8.2 As to the claim under article 6, paragraph 2, of the Covenant, the Committee observes at the outset, in response to the State party's argument that the Committee's function is not to assess the constitutionality of a State party's law, that its task rather is to determine the consistency with the Covenant alone of the particular claims brought before it.

8.3 The Committee notes that the offence of murder in the State party's law entails a very broad definition, requiring simply the killing of another individual. In the present case, the Committee observes that the Supreme Court considered the case to be governed by article 48 of the Revised Penal Code, according to which, if a single act constitutes at once two crimes, the maximum penalty for the more serious crime must be applied. The crimes committed by a single act being three murders and an attempted murder, the maximum possible penalty for murder - the death penalty - was imposed automatically by operation of the provisions of article 48. The Committee refers to its jurisprudence that mandatory imposition of the death penalty constitutes arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without regard being able to be paid to the defendant's personal circumstances or the circumstances of the particular offence.[5] It follows that the automatic imposition of the death penalty upon the authors by virtue of article 48 of the Revised Penal Code violated their rights under article 6, paragraph 1, of the Covenant.

8.4 In the light of the above finding of a violation of article 6 of the Covenant, the Committee need not address the authors' remaining claims which all concern the imposition of capital punishment in their case.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 6, paragraph 1, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective and appropriate remedy, including commutation. The State party is under an obligation to avoid similar violations in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Section 6 of the said Act amended article 248 of the Revised Penal Code to read as follows:

> "Art. 248. *Murder* - Any person who, not falling within the provisions of article 246 [parricide], shall kill another, shall be guilty of murder and shall be punished by *reclusion perpetua*, to death if committed with any of the following attendant circumstances:
>
> 1. With treachery, taking advantage of superior strength, with the aid of armed men, or employing means to weaken the defence or of means or persons to insure or afford impunity.
> 2. In consideration of a price, reward or promise.
> 3. By means of inundation, fire, poison, explosion, shipwreck, stranding of vessel, derailment or assault upon a railroad, fall of an airship, or by means of motor vehicles, or with the use of any other means involving great waste and ruin.
> 4. On occasion of any of the calamities enumerated in the preceding paragraph, or of an earthquake, eruption of a volcano, destructive cyclone, epidemic, or other public calamity.
> 5. With evident premeditation.
> 6. With cruelty, by deliberately and inhumanely augmenting the suffering of the victim, or outraging or scoffing at his person or corpse."

[2] Article 48 of the Revised Penal Code provides as follows: "*Penalty for complex crimes.* - When a single act constitutes two or more grave or less grave felonies, or when an offence is a necessary means for committing the other, the penalty for the most serious crime shall be imposed, the same to be applied in its maximum period."

[3] *People v. Echegaray* (GR No. 117472, judgement of 7 February 1997).

[4] ECOSOC resolution 1984/50 of 25 May 1984, as endorsed by General Assembly resolution 39/118 of 14 December 1984.

[5] *Thompson v. St. Vincent and The Grenadines* Case No. 806/1998, Views adopted on 18 October 2000; and *Kennedy v. Trinidad and Tobago* Case No. 845/1998, Views adopted on 26 March 2002.

APPENDIX

Individual opinion of Committee member Mr. Nisuke Ando (dissenting)

I am unable to agree to the majority Views' statement that "[t]he Committee refers to its jurisprudence that mandatory imposition of the death penalty constitutes arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without regard being able to be paid to the defendant's personal circumstances or the circumstances of the particular offence" (para. 8.3).

Firstly, I doubt if it is the established jurisprudence of the Committee that "mandatory imposition of the death penalty constitutes arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant". The majority Views is based on the Committee's Views in Case No. 806/1998, adopted on 18 October 2000 (*Thompson v. St. Vincent and the Grenadines*). (The Committee adopted a similar decision in Case No. 845/1998 *Kennedy v. Trinidad and Tobago*, but the relevant facts in the two cases are different.) However, I must point to the fact that two dissenting opinions were appended to the Views by five members (one by Lord Colville; another by Messrs. Kretzmer, Amor, Yalden and Zakhia). I happened to be absent when the Views were adopted and was unable to express my opinion. Had I been participating in the decision, I would have co-signed both of the dissenting opinions.

In any event, as emphasized by Mr. Kretzmer et al. as well as by Lord Colville, the Committee's Views in the *Thompson* case were a departure from the then existing practice of the Committee. Prior to that decision, the Committee had dealt with many communications from persons sentenced to death under legislation which makes a death sentence for murder mandatory. However, in none of them had the Committee stated that the mandatory nature of the sentence involved a violation of article 6 or any other provision of the Covenant. In addition, in fulfilling its function under article 40 of the Covenant, the Committee has considered reports from States parties whose domestic legislation provides for mandatory imposition of the death sentence for murder, but the Committee has never stated in its Concluding Observations that a mandatory death sentence for murder is incompatible with the Covenant. Moreover, in its general comment No. 6 on article 6, the Committee gives no indication that mandatory death sentences are incompatible with article 6. Of course, as Mr. Kretzmer et al point out, the Committee is not bound by its previous jurisprudence. Nevertheless, if the Committee wishes to change its jurisprudence, it should explain its reasons for change to the State party and person concerned. Unfortunately, such an explanation was lacking in the Committee's Views in the *Thompson* case. Nor is it supplied in its Views in the present case.

Secondly, Lord Colville clearly states that, under common law jurisdictions, courts have to take into account factual and personal circumstances in sentencing to the death penalty in homicide cases. According to him, factors such as self-defence, provocation by the victim, proportionality of the response by the accused and the accused's state of mind are scrutinized by courts, and a charge of murder may be reduced to that of manslaughter. Likewise, in civil law jurisdictions, various aggravating or extenuating circumstances such as self-defence, necessity, distress and mental capacity of the accused need to be considered in reaching criminal conviction/sentence in each case of homicide. These points must have been dealt with before the relevant courts of the Philippines rendered their decisions in the present case, but the majority Views refers to none of them, merely noting that "the offence of murder in the State party's law entails a very broad definition, requiring *simply the killing of another individual*" (paragraph 8.3; emphasis supplied).

However, as note 1 (para. 2.2) indicates, article 248 of the Revised Penal Code of the Philippines defines "murder" as follows: "Any person who … shall kill another, shall be guilty of murder and shall be punished … to death if committed with any of the following attendant circumstances" such as "[w]ith treachery, taking advantage of superior strength, with the aid of armed men, or employing means to weaken the defence or of means or persons to insure or afford impunity" or "[b]y means of inundation, fire, poison, explosion, shipwreck, stranding of vessels, derailment or assault upon a railroad, fall of an airship, or by means of motor vehicles, or with the use of any other means involving great waste and ruin". Obviously, the courts in the Philippines looked into these provisions, in addition to the aggravating and extenuating circumstances as described above.

The majority Views state that "the Supreme Court [of the Philippines] considered the case to be governed by article 48 of the Revised Criminal Code, according to which, if a single act constitutes at once two crimes, the maximum penalty for the more serious crime must be applied. The crimes committed by a single act being three murders and an attempted murder, the maximum possible penalty for murder - the death penalty - was imposed *automatically* by operation of the provisions of article 48" (paragraph 8.3; emphasis supplied). It seems to me that the quoted provisions of article 48 are standard ones which can be found in the criminal codes of very many States. And yet, the majority Views continues, "It follows that the *automatic* imposition of the death penalty upon the authors by virtue of article 48 of the Revised Criminal Code violated their rights under article 6, paragraph 1, of the Covenant" (paragraph 8.3; emphasis supplied). The crimes committed by the authors are certainly "the most serious crimes in accordance with the law in force at the time of the commission of the crimes" in the Philippines, and the application of article 48 to them is indeed normal criminal procedure. Considering all the relevant circumstances, I must conclude that to describe the imposition of the death penalty to the authors in the present case as "mandatory" or "automatic" is not at all warranted.

Thirdly, I wonder if the majority Views are justifiable only on the assumption that the death penalty is per se an arbitrary deprivation of life. However, such an assumption is contradictory to the structure of the Covenant, which admits the death penalty for the most serious crimes (art. 6, para. 2). It is equally contradictory to the fact that the Protocol aiming at the abolition of the death penalty is "Optional". The provision of article 6, paragraph 6, suggests that the abolition of the death penalty is desirable, but that desirability does not make the abolition a legal obligation. It is true that, in certain regions of the globe, most States have abolished the death penalty. At the same time, it is also true that, in the other regions of the globe, most States have retained the death penalty. In my opinion, the Human Rights Committee, which is based on the global community of States, should take into account this situation when interpreting and applying any provisions of the International Covenant on Civil and Political Rights.

(*Signed*): Nisuke Ando

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Ms. Ruth Wedgwood (dissenting)

The Human Rights Committee has concluded that the State party has injured the four authors of this communication by subjecting them to a "mandatory imposition of the death penalty" that "constitutes arbitrary deprivation of life, in violation of article 6, paragraph 1" of the International Covenant on Civil and Political Rights. See Views of the Committee, paragraph 8.3. The Committee asserts that the death penalty was "imposed without regard being able to be paid to … the circumstances of the particular offence". Ibid., paragraph 8.3.

The posture in which the Committee considers this issue is problematic at best. The authors' communication did not put forward any complaint concerning supposedly mandatory sentencing, and thus the State party has been deprived of any ability at all to comment on the argument which the Committee now raises on its own motion. The communication from the authors is dated 6 May 2002, well after publication of this Committee's earlier opinions on the question of mandatory death penalties,* and the authors had the advice of professional legal counsel in declining to raise any similar claims before the Committee. The Committee has not referred the issue of mandatory sentencing to the State party for comment, even though the issue may turn crucially on a construction of the Philippine statutes on murder and so-called multiple offences. Indeed, the Committee's decision has been undertaken even without a copy of the trial court opinion in hand.

The Committee's earlier jurisprudence disputing death sentences as "mandatory" occurred in cases concerning felony murder (where an unanticipated death occurred in the course of commission of a felony) and an undifferentiated murder statute (in which all intentional killings were subject to the death penalty).* It is far more radical to suppose that a democratically-adopted criminal code which carefully specifies the aggravating factors that must accompany a murder before the death penalty can be imposed somehow falls afoul of an implied prohibition on mandatory sentencing under article 6 of the International Covenant on Civil and Political Rights. Indeed, the omission of the claim from the authors' petition may reflect the view that such a claim is unpersuasive in these circumstances.

In its review of the convictions and sentences in this case, the Philippines Supreme Court noted that the revised Philippine murder statute provides for the death penalty only if one or more aggravating circumstances has been proven - here, a wilful murder through "treachery". The authors were convicted of the murder of Florentino Dulay and his two daughters, and for the attempted murder of a third daughter. The crimes were accomplished by "hurling a grenade in the bedroom of the Dulays" during the evening hours, while the children lay in their beds. See Opinion of the Philippines Supreme Court, 4 April 2001, at page 13. The motive, according to the opinion of the Supreme Court, was to prevent Florentino Dulay from testifying against one of the authors of the communication in a separate murder trial. The youngest victim was a 5-year-old girl, killed by shrapnel from the grenade. The defendants were identified by an eyewitness who was long acquainted with them, and the trial court rejected their proffered alibis as implausible. The Philippines Supreme Court reviewed the conviction *en banc*, and though four members of the Supreme Court registered their position that the death penalty is inconsistent with the national constitution, they agreed to "submit to the ruling of the Court, by a majority vote, that the law is constitutional and that the death penalty should be accordingly imposed". (Opinion, at p. 16.) No claim was made to the Philippines Supreme Court that the death penalty was mandatory and thereby improper.

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* *Thompson v. St Vincent and The Grenadines* Case No. 806/1998, Views adopted on 18 October 2000; and *Kennedy v. Trinidad and Tobago* Case No. 8465/1998, Views adopted on 26 March 2002. I share the doubts expressed by Mr. Ando concerning these prior decisions, but will take them as a starting point in the instant case.

Article 248 of the *Revised Penal Code* provides for the imposition of the death penalty only if an aggravating circumstance is found, including "treachery" or "explosion" in the commission of the murder. The statutory definition of treachery was met, noted the Supreme Court, for it consists of "taking advantage of superior strength, with the aid of armed men, or employing means to weaken the defence or of means or persons to ensure or afford impunity". Here, "the victims were sleeping when the grenade was suddenly thrown into their bedroom" and "they were not given a chance to defend themselves or repel the assault. Obviously, the assault was done without any risk to any of the accused arising from the defence which the victims may make". Opinion at page 12, note 23. The Supreme Court remarked that the aggravating factor of "explosion" could also have fit the case, though it was not alleged in the criminal information.

The Committee does not challenge the legitimacy of article 248 *in se*. Rather, the Committee supposes that there is a mandatory quality to the death sentence because the case was also sentenced under a so-called "multiple crimes" provision found in article 48 of the *Revised Penal Code*. This is because the conviction included attempted murder as well as multiple murders. Article 48 provides that "When a single act constitutes two or more grave or less grave felonies … the penalty for the most serious crime shall be imposed, the same to be applied in its maximum period".

Article 48 is apparently designed to avoid the problem of so-called "multiplicity", that is, the potential multiplication of charges and sentences arising from a single culpable action. The straightforward solution was to provide for the imposition of "the penalty for the most serious crime … the same to be applied in its maximum period". It is syntactically doubtful that the phrase "maximum period" references the death penalty.* But in any event, there is nothing in article 48 that obviates or lessens the separate requirement under the murder statute, article 248, that a court *must* find an aggravating circumstance before a death penalty is proper.

In other words, the sentence of death properly imposed for a murder with treachery does not become mandatory merely because it was accompanied by an additional conviction of attempted murder. The Committee gives no persuasive basis for its conclusion that the death penalty was imposed "automatically" or "without regard being able to be paid to … the circumstances of the particular offence".

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* The Committee asserts without explanation that article 48 always requires "*the most serious* penalty of the more serious of several crimes". View of the Committee, paragraph 2.4 (emphasis added). But the language of article 48 actually reads "*the penalty* for the most serious crime … the same to be applied in its *maximum period*". (Emphasis added.) Again, one might have wished to solicit the State party's views on this interpretive question of local law.

There are varying views on the admissibility of the death penalty in modern societies. article 6 (2) of the Covenant by which this Committee is governed provides that "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious of crimes in accordance with the law in force at the time of the commission of the crime …". Perhaps wisely, the Committee has not accepted the authors' invitation to conclude that the murder of sleeping children by the explosion of a grenade is not a "most serious crime". Nor has the Committee had occasion to address the authors' claim that the ameliorative constitutional change in the Philippines - limiting the death penalty to "heinous crimes" - somehow constitutes a forbidden "re-imposition" of the death penalty allegedly barred by article 6 (2). In its attempt to raise a claim that the parties themselves have avoided, the Committee has relied upon a doubtful construction of Filipino law and misconstrues the import of its own past decisions.

(*Signed*): Ruth Wedgwood

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

FF. Communication No. 1086/2002, *Weiss v. Austria**
(Views adopted on 3 April 2003, seventy-seventh session)

Submitted by:	Sholam Weiss (represented by counsel Mr. Edward Fitzgerald)
Alleged victim:	The author
State party:	Austria
Date of communication:	24 May 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 2003,

Having concluded its consideration of communication No. 1086/2002, submitted to the Human Rights Committee on behalf of Mr. Sholam Weiss under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, initially dated 24 May 2002, is Sholam Weiss, a citizen of the United States of America and Israel, born on 1 April 1954. At the time of submission, he was detained in Austria pending extradition to the United States of America ("the United States"). He claims to be a victim of violations by Austria of article 2, paragraph 3, article 7, article 10, paragraph 1, and article 14, paragraph 5, of the International Covenant on Civil and Political Rights. He also claims to be a victim of a violation of his right to be free from unlawful detention and of his right to "equality before the law", possibly raising issues under articles 9, 26, and 14, paragraph 1, respectively. Subsequently, as a result of his extradition, he claims to be a victim of a violation of article 9, paragraph 1, of the Covenant, as well as of articles 1 and 5 of the Optional Protocol. The author is represented by counsel.

1.2 On 24 May 2002, the Committee, acting through its Special Rapporteur for new communications, pursuant to Rule 86 of the Committee's rules of procedure, requested the State party not to extradite the author until the Committee had received and addressed the State party's submission on whether there was a risk of irreparable harm to the author, as alleged by counsel. On 9 June 2002, the State party, without having made any submissions to the Committee, extradited the author to the United States.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castllero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

1.3 Upon ratification of the Optional Protocol, the State party entered a reservation in the following terms: "The Republic of Austria ratifies the Optional Protocol ... on the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee ... shall not consider any communication from an individual unless it has ascertained that the same matter has not been examined by the European Commission of Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

The facts as submitted

2.1 In a trial beginning on 1 November 1998 in the District Court of Florida, the author was tried on numerous charges of fraud, racketeering and money laundering. He was represented throughout the trial by counsel of his choice. On 29 October 1999, as jury deliberations were about to begin, the author fled the courtroom and escaped. On 1 November 1999, the author was found guilty on all charges. Following submissions from the prosecution, and the author's counsel in opposition, as to whether sentencing should proceed in his absence, the Court ultimately sentenced him in absentia on 18 February 2000 to 845 years' imprisonment (with possibility to reduce it, in the event of good behaviour, to 711 years (sic)) and pecuniary penalties in excess of US$ 248 million.

2.2 The author's counsel lodged a notice of appeal within the 10-day time limit stipulated by law. On 10 April 2000, the United States Court of Appeals for the Eleventh Circuit rejected the motion of the author's counsel to defer dismissal of the appeal, and dismissed it on the basis of the "fugitive disentitlement" doctrine. Under this doctrine, a court of appeal may reject an appeal lodged by a fugitive on the sole grounds that the appellant is a fugitive. With that decision, the criminal proceedings against the author were concluded in the United States.[1]

2.3 On 24 October 2000, the author was arrested in Vienna, Austria, pursuant to an international arrest warrant, and on 27 October 2000 transferred to extradition detention. On 18 December 2000 the United States submitted a request to the Austrian authorities for the author's extradition. On 2 February 2001, the investigating judge of the Vienna Regional Criminal Court ("*Landesgericht für Strafsachen*") recommended that the Vienna Upper Regional Court ("*Oberlandesgericht*"), being the court of first and last instance concerning the admissibility of an extradition request, hold the author's extradition admissible.

2.4 On 25 May 2001, the Vienna Upper Regional Court sought the advice of the United States authorities as to whether it remained open to the author to challenge his conviction and sentence. Thereupon, on 21 June 2001 the United States Attorney lodged an emergency motion to reinstate the author's appeal with the United States Court of Appeals for the Eleventh Circuit. The author's counsel explicitly took no position on the motion, but questioned the State's standing to file such an application on the author's behalf. On 29 June 2001 that court denied the motion. On 5 July 2001, the United States prosecutor filed another emergency motion with the United States District Court for the Middle District of Florida, which sought to vacate that court's judgement concerning the author. On 6 July 2001 the Court refused the motion and confirmed that its judgement was unimpeachable.

2.5 On 13 August 2001, the author applied to the European Court of Human Rights ("the European Court"), alleging that his extradition would violate the following provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"): article 3, in that he would have to serve a mandatory life sentence; article 6, and article 2 of Protocol No. 7, on the basis that his conviction and sentence were pronounced in absentia and no appeal was available to him; article 5 in that his detention with a view to extradition was unlawful; and article 13.

2.6 On 11 September 2001, the Vienna Upper Regional Court refused the United States request for the author's extradition. The sole ground for refusal was that the author's extradition without an assurance that he would be entitled to a full appeal would be contrary to article 2 of Protocol No. 7 to the European Convention.[2]

2.7 The State Prosecutor (who alone has standing to lodge such an appeal) appealed the Upper Regional Court's decision to the Supreme Court ("*Oberster Gerichtshof*"). On 9 April 2002, the Supreme Court held that the Upper Regional Court's decision was a nullity because it had no jurisdiction to consider the right to an appeal under article 2 of Protocol No. 7 to the European Convention. The Upper Regional Court could only consider the specific aspects listed in the extradition statute (whether the author had enjoyed a fair trial and whether his punishment would amount to cruel, inhuman or degrading treatment or punishment); by contrast, the Minister of Justice was the sole authority with the competence to consider any further issues (including the right to an appeal) when s/he subsequently decided whether or not to extradite a person whose extradition had judicially been found to be admissible. The Upper Regional Court's judgement was accordingly set aside, and the case was remitted.

2.8 On 8 May 2002, the Upper Regional Court, upon reconsideration, found that the author's extradition was admissible on all counts except that of "perjury while a defendant" (for which the author had been sentenced to 10 years imprisonment). In conformity with the Supreme Court's decision, the Court concluded that the author had enjoyed a fair trial and that his sentence would not be cruel, inhuman or degrading. It did not address the issue of the author's right to an appeal. On 10 May 2002, the Minister of Justice allowed the author's extradition to the United States, without reference to any issues as to the author's human rights.[3]

2.9 On 10 May 2002, the European Court of Human Rights indicated interim measures, staying the author's extradition. On 16 May 2002, following representations of the State party, the Court decided not to prolong the application of the interim measures. On the author's application, the Constitutional Court ("*Verfassungsgerichtshof*") issued an injunction on 17 May 2002 staying (until 23 May 2002) execution of the author's extradition.

2.10 On 23 May 2002, the Constitutional Court refused to accept the author's complaint for decision, on the basis that it had insufficient prospects of success and was not excluded from the competence of the Administrative Court ("*Verwaltungsgerichtshof*"). The Court accordingly terminated the injunction. On the same day, the author again applied to the European Court of Human Rights for the indication of interim measures, an application that was denied.

2.11 On 24 May, the author informed the European Court that he wished to withdraw his application "with immediate effect". On the same day, he petitioned the Administrative Court, challenging the Minister's decision to extradite him and seeking an injunction to stay the author's extradition, pending decision on the substantive challenge. The stay was granted and referred to the Ministry of Justice and the Vienna Regional Criminal Court.

2.12 On 26 May, an attempt was made to surrender the author. After a telephone call by the ranking officer of the airport police to the president of the Administrative Court, the author was returned to a detention facility in light of the stay issued by the Administrative Court and the author's poor health. On 6 June 2002, the investigating judge of the Vienna Regional Criminal Court considered the Administrative Court to be "incompetent" to entertain any proceedings or to bar implementation of the extradition, and directed that the author be surrendered.
On 9 June 2002, the author was transferred by officials of the author's prison and of the Ministries of Justice and the Interior, to the jurisdiction of United States military authorities at Vienna airport, and returned to the United States.

2.13 At the time the author was extradited, two sets of proceedings remained pending before the Constitutional Court, neither of which had suspensive effect under the State party's law. Firstly, on 25 April 2002, the author had lodged a constitutional motion attacking the constitutionality of various provisions of the State party's extradition law, as well as of the extradition treaty with the United States, in particular its treatment of judgement in absentia. Secondly, on 17 May 2002, he had lodged a "negative competence challenge" ("*Antrag auf Entscheidung eines negativen Kompetenzkonfliktes*") to resolve the question whether the issue of a right to an appeal must be resolved by administrative decision or by the courts, as both the Upper Regional Court as well as the Minister of Justice had declined to deal with the issue.

2.14 On 13 June 2002, the Administrative Court decided, given that the author had been removed in violation of the Court's stay on execution, that the proceedings had been deprived of any object and suspended them. The Court observed that the purpose of its order to stay extradition was to preserve the rights of the author pending the main proceedings, and that as a result no action could be taken to the author's detriment on the basis of the Minister's challenged decision. As a consequence, the author's surrender had no sufficient legal basis.

2.15 On the same day, the European Court of Human Rights noted that the author wished to withdraw his application. After setting out the facts and the complaint, the Court considered that respect for human rights as defined in the Convention and its Protocols did not require continuation of its examination of the case irrespective of the applicant's wish to withdraw it, and struck out the application.[4]

2.16 On 12 December 2002, the Constitutional Court decided in the author's favour, holding that the Upper Regional Court should examine all admissibility issues concerning the author's human rights, including issues of a right to an appeal. Thereafter, the Minister's formal decision to extradite should consider any other issues of human dignity that might arise. The Court also found that the author's inability, under the State party's extradition law, further to challenge a decision of the Upper Regional Court finding his extradition admissible was contrary to rule of law principles and unconstitutional.

The complaint

3.1 In his original communication (preceding extradition), the author claims that extradition to the United States would deprive him of the ability to be present in the State party for the vindication of his claims in that jurisdiction. In particular, he would be unable to enjoy the benefits of the remedies flowing from the Constitutional Court's determination of the "negative competence" challenge as to which court or administrative authority should consider his argument of a denial of a right to a fair trial/appeal, as well as the consideration thereafter by the competent authority of this issue, as required by articles 14, paragraph 5, and 2, paragraph 3, read together. Extradition would prevent him enjoying remedies such as barring of extradition altogether, extradition for a sentence equivalent to that which would be imposed in the State party, or extradition subject to full rights of appeal. He argues that neither the State party's courts nor administrative authorities have ever substantively addressed the issue of his alleged denial, in the United States, of a right to a fair trial/appeal.

3.2 The author also claims that the State party, if it extradited him, would abet and adopt the violation of his right under article 14, paragraph 5, already allegedly suffered in the United States. In light of the finality of the criminal proceedings in the United States, his extradition to the United States would be unlawful, firstly as his conviction was pronounced and his sentence imposed in absentia and, secondly, as he had and has no effective opportunity to appeal against conviction or sentence under the fugitive disentitlement doctrine. Specifically, he cannot appeal in respect of the fact that his conviction was pronounced and his sentence was imposed in absentia. The author argues that the right to a fair trial/appeal in the Covenant is mandatory, and, if not complied with, this would render an extradition unlawful.

3.3 The author claims a violation of his right to "equality before the law". Only the State Prosecutor has the ability to lodge an appeal to the Supreme Court against a decision of the Upper Regional Court, subject to the proviso under the State party's domestic law, that such an appeal cannot operate to the detriment of the person whose case is appealed, as that person is unable to avail themselves of such an appeal. In the present case, the Supreme Court reversed the Upper Regional Court's decision that the author could not be extradited, and returned the case for a reconsideration that did not take into account the author's rights to a fair trial/appeal.

3.4 The author claims that his sentence for a period of 845 years without opportunity for release until at least 711 years have been served is an "exceptional and grotesque punishment" that is "inhuman" and amounts to the most serious form of incarceration short of actual torture. He argues that there is a "clear and irreversible" breach of article 10, paragraph 1, of the Covenant, because of the excessive length of the sentence and the absence of any possibility of release within a lifetime, or of any appeal. The State party is responsible for the failure of its courts and/or administrative authorities to consider this issue.

3.5 Finally, the author complains that he is unlawfully detained. He argues that as his extradition is unlawful because he was denied a fair trial/appeal, any detention with a view to extradition must also be unlawful.

3.6 As to the admissibility of his complaint, the author argues that with the Constitutional Court's judgement against him, all effective remedies were exhausted. He submits that the complaints raised in the communication are not "being examined", in terms of article 5, paragraph 2, of the Optional Protocol, under the European (or any other) procedure of international investigation or settlement. Nor does the State party's reservation to article 5, paragraph 2, of the Optional Protocol preclude the Committee from considering the communication.

3.7 The author argues, firstly, that there was never any formal decision of the European Court on the admissibility or merits of the application to the European Court, but merely procedural decisions. In view of the interpretation given by the Committee to the word "examined" in the Austrian reservation in the case of *Pauger v. Austria*,[5] it is submitted that these procedural steps did not constitute an "examination" of the case. Secondly, while it remained pending, the application was not communicated to the State party for its observations on either the admissibility and/or merits. Thirdly, in any event, the communication relates in part to rights (such as articles 2, paragraph 3, and 10, paragraph 1, of the Covenant) which are not protected under the European Convention.

3.8 By submission of 19 June 2002 (post-extradition), the author argued that his removal neither prevents the Committee from examining the communication, nor affected the interim measures requested by the Committee. The author refers to the Committee's public discussion of a State party's obligations in a previous case in which a request for interim measures had not been complied with.[6] He invokes the jurisprudence of the PCIJ to the effect that participation in a system of international adjudication implies that the State party accepts an obligation to abstain from "any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute".[7] Similarly, the International Court of Justice has decided that its provisional measures are binding upon the parties to a dispute before it.[8]

3.9 In the specific case, the author argues that the jurisprudence of the Committee suggests that the author would suffer a risk of irreparable harm. In *Stewart v. Canada*,[9] interim measures were requested in circumstances where it was unlikely that the author would be able to return to his adopted homeland, Canada, while, in the present case, there is no possibility of release from prison.

3.10 The author recalls that his case is not one where the gap between the request for interim measures (24 May 2002) and the action sought to be prevented (9 June 2002) was short. Accordingly, he requests that the Committee direct the State party to explain the factual basis of his removal, whether and how the request for interim measures was taken into account by the State party in removing him, and how the State party proposed to fulfil its continuing obligations.

The State party's submissions on the admissibility and merits of the communication

4.1 By submissions of 24 July 2002, the State party contested both the admissibility and the merits of the communication. It argues that the author has not exhausted domestic remedies. While accepting that the Committee has not usually required domestic proceedings to have been concluded at the time of submission of the communication, it argues that they have to have been concluded by the time the Committee considers the communication.[10] In view of the proceedings that were, at the time of the State party's submission, still pending before the Constitutional Court, the State party argues that this requirement has not been satisfied.

4.2 The State party invokes its reservation to article 5, paragraph 2, of the Optional Protocol and argues that a complaint already submitted to the European organs may not be submitted to the Committee. It contends that the complaint was "examined" by the European Court on the merits - after seeking observations from the State party, the Court clearly made a merits assessment of the case. In requesting withdrawal of the case from the Court's list before presenting it to the Committee, the author makes clear that he raises essentially the same concerns before both organs.

4.3 On the merits, the State party points out that extradition as such is outside the scope of the Covenant, so that the issue is whether the State party would subject the author to treatment contrary to the Covenant in a State not party to the Optional Protocol by virtue of extradition.[11] In terms of domestic proceedings, the State party argues that the ordinary as well as the highest courts, as well as the administrative authorities, carefully examined the author's submissions, and he was legally represented throughout. The State party recalls that extradition proceedings, according to the jurisprudence of the European Court, do not necessarily enjoy the same procedural guarantees as criminal proceedings on which the extradition is based.[12]

4.4 As to the alleged violation of article 14, paragraph 5, on the ground that the author was found guilty and sentenced in absentia, the State party recalls the Committee's jurisprudence that a trial in absentia is compatible with the Covenant only if the accused is summoned in a timely manner and informed of the proceedings against him.[13] In the present case, the author does not contend that these requirements were not fulfilled - he fled after all evidentiary proceedings had concluded and the jury had retired to deliberate, and did not return thereafter to participate in further proceedings. He was therefore not convicted in absentia, and that sentencing occurred subsequently does not change this conclusion.

4.5 As to the second alleged violation of article 14, paragraph 5, in conjunction with article 2, paragraph 3, arising from the denial of a fair appellate hearing in the United States due to his absence, the State party points out that article 14, paragraph 5, guarantees a right to appeal "according to law". The State party in question is thus free to define in greater detail the substantive and procedural content of the right, including, in this case, the formal requirement that an appellant must not be a fugitive when an appeal is filed. The author was legally represented and aware of the legal situation in the United States, and thus it can be reasonably assumed from his overall conduct, including his flight from the United States, that he renounced his right to appeal. The State party notes that the author did not support the motion of the United States Attorney to reinstate his appeal, in order to prevent his extradition to the United States. He never submitted an appeal, and his notice of appeal remains without content. As to his future treatment in this respect, the State party observes that its Minister of Justice sought assurances of the competent United States authorities, which were provided, that new proceedings for determining a sentence would be open to the author on *all* counts.

4.6 As to the allegation that the author's life-long imprisonment violates article 10, paragraph 1, the State party argues that this provision refers solely to the conditions of detention, rather than its duration. It refers to the Committee's jurisprudence that the mere fact of deprivation of liberty does not imply a violation of human dignity.[14] The State party argues that the 845-year sentence is not disproportionate or inhuman taking into account the numerous property offences and the losses suffered by pension holders. It also notes that the sentencing court did not exclude conditional release, provided the author pays restitution of US$ 125 million and a fine of US$ 123 million. The State party also points out that, while the European Court has suggested that lifetime imprisonment may raise issues under article 3 of the European Convention, it has not yet made such a finding.[15]

4.7 For the State party, nothing in the Covenant prevents extradition to a State where an offence carries a more severe sentence (short of corporal punishment). Any contrary position would deprive the instrument of extradition of its utility in terms of international cooperation in the administration of justice and denial of impunity, a purpose the Committee has itself stressed.[16]

Further issues arising in relation to the Committee's request for interim measures

5.1 By letter of 2 August 2002 to the State party's representative to the United Nations in Geneva, the Committee, through its Chairperson, expressed great regret at the author's extradition, in contravention of its request for interim protection. The Committee sought a written explanation about the reasons which led to disregard of the Committee's request for interim measures and an explanation of how it intended to secure compliance with such requests in the future. By note of the same date, the Committee's Special Rapporteur on new communications requested the State party to monitor closely the situation and treatment of the author subsequent to his extradition, and to make such representations to the Government of the United States that were deemed pertinent to prevent irreparable harm to the author's Covenant rights.

5.2 By submissions dated 15 October 2002, the State party, in response to the Committee's request for explanation, explains that following receipt of the Committee's request for interim measures, the Federal Minister of Justice on 25 May 2002 ordered the Vienna Public Prosecutor's Office ("*Staatsanwaltschaf*") to file a request with the investigating judge of the Vienna Regional Criminal Court seeking suspension of the extradition. The same day, the Court refused to comply with this request, on the basis that rule 86 of the Committee's rules of procedure may neither invalidate judicial orders or restrict the jurisdiction of an independent domestic court. On 6 June 2002, the investigating judge ordered the author's surrender.

5.3 As to the legal issues arising, the State party argues that rule 86 of the Committee's rules of procedure does not oblige States parties to amend their constitutions so as to provide for direct domestic effect of requests for interim measures. A request under rule 86 "does not as such have any binding effect under international law". A request made under Rule 86 cannot override a contrary obligation of international law, that is, an obligation under the extradition treaty between the State party and the United States to surrender a person in circumstances where the necessary prerequisites set out in the treaty were followed. The State party points to the extensive consideration of the author's case by its courts and the European Court.

5.4 As to the current situation, the State party observes that the United States Attorney has applied to the United States District Court for the author to be re-sentenced (such that he would not serve sentence for the offence of "perjury while a defendant in respect of which extradition was denied"). According to information supplied to the State party, re-sentencing would provide the author with a full right of appeal against the (new) sentence, and against the original conviction itself. The State party will continue to seek information from the United States authorities in an appropriate manner about the progress of proceedings in the United States courts.

The author's comments

6.1 By letter of 8 December 2002, the author claimed a breach of article 9, paragraph 1, of the Covenant since he was surrendered to the United States in breach of the Committee's request for interim measures. He invokes the Committee's Views in *Piandiong v. The Philippines*.[17]

6.2 By letter of 21 January 2003, the author rejected the State party's contention that the Committee's request under Rule 86 gave way to the international obligation to extradite found in its extradition treaty with the United States. The author notes that the treaty itself, as well as the State party's domestic law, provide for refusal of extradition on human rights grounds. In any event, mandatory obligations under human rights treaties owed *erga omnes*, including under the Covenant, take precedence over any inter-State treaty obligations.

6.3 The author submits there is an express obligation under international law, the Covenant and the Optional Protocol for the State party to respect a request under rule 86. This obligation can be derived both from article 2, paragraph 3, of the Covenant, and from the recognition, upon adherence to the Optional Protocol, of the Committee's competence to determine violations of the Covenant, which must also imply, subsidiarily, respect for the Committee's properly promulgated rules of procedure.

6.4 The author relies on the Committee's jurisprudence for the proposition that the exposure of a person, to an irreversible measure prior to [illegible] of a case defeats the purpose of the Optional Protocol and deprives that person of the [illegible] remedy the Covenant obliges a State party to provide.[18] Thus the findings of the Vienna Regional Criminal Court (see paragraph 5.2 above) ignored direct obligations under articles 1 and 5 of the Optional Protocol. The Committee is invited to direct the State party to indicate what steps it proposes to take to remedy this breach, including by means of diplomatic representation to the United States, to restore the status quo ante.

6.5 As to the State party's admissibility arguments, the author argues that the proceedings pending in the courts were neither timely, real nor effective, as he was removed before they were completed. In any event, with the Constitutional Court's decision of 12 December 2002, domestic remedies are now exhausted. He rejects the contention that the European Court had "examined" his case within the meaning of the State party's reservation to article 5, paragraph 2, of the Optional Protocol, for the decision to strike the case from its lists "clearly did not involve any determination of the merits".

6.6 On the merits, the author maintains he suffered a violation of article 14, paragraph 5, in that he was deprived, through the "fugitive disentitlement" doctrine, of appellate review of conviction or sentence in the United States. This doctrine also served to deny the United States motion to reinstate his appeal. The author challenges the notion that he "renounced" his appeal, as the appellate court rejected his (counsel's) motion to defer dismissal of the appeal. In Austria, this violation was adopted, as no court with effective jurisdiction considered this aspect of his case before he was removed. The Constitutional Court's recognition that the lower courts should have done so came too late to provide an effective remedy.

6.7 As to the claim of a violation of articles 7 and 10, the author submits that an 845-year sentence for offences of fraud is grossly disproportionate, an element that amounts to inhuman punishment.[19] The author rejects the State party's reliance on *Vuolanne v. Finland*,[20] observing that that case concerned a deprivation of liberty of 10 days, scarcely comparable to his own sentence. He further submits that a life sentence (without parole) for a non-violent offence is per se an inhuman sentence. He invokes a decision of the German Constitutional Court finding a life sentence for murder unconstitutional without provision for parole rehabilitation and conditional release.[21] A fortiori, a life sentence for an offence of no irreparable physical or psychological harm and with a possibility of restitution would be inhuman. The sentence is an affront to human dignity and, since it is devoid of rehabilitative possibility, violates article 10, paragraph 1.

6.8 The author rejects the State party's argument that extradition to a country where a possibly more serious penalty looms than is applicable in the extraditing State is unobjectionable as being inherent the nature of extradition, for at some point the more serious penalty becomes so inhuman that it is inhuman to so extradite someone. The author relies on the Committee's Views in *Ng v. Canada*[22] for this proposition, and also refers to the jurisprudence of the European Court suggesting that a wholly disproportionate custodial penalty such as an irreducible life sentence (as distinct from physical or psychological torture) could also rise to such a level of inhumanity.[23]

The State party's failure to respect the Committee's request for interim measures of protection

7.1 The Committee finds, in the circumstances of the case, that the State party breached its obligations under the Protocol, by extraditing the author before the Committee could address the author's allegation of irreparable harm to his Covenant rights. In particular, the Committee is concerned by the sequence of events in this case in that, rather than requesting interim measures of protection directly upon an assumption that irreversible harm could follow the author's extradition, it first sought, under rule 86 of its rules of procedure, the State party's views on the irreparability of harm. In so doing, the State party could have demonstrated to the Committee that extradition would not result in irreparable harm.

7.2 Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 As to the State party's argument that domestic remedies have not been exhausted, the Committee observes that the remedy of petitioning the Constitutional Court has been exhausted since the State party's submission. Furthermore, the Committee observes that in a case where it has requested interim measures of protection, it does so because of the possibility of irreparable harm to the victim. In such cases, a remedy which is said to subsist after the event which the interim measures sought to prevent occurred is by definition ineffective, as the irreparable harm cannot be reversed by a subsequent finding in the author's favour by the domestic remedies considering the case. In such cases, there remain no effective remedies to be exhausted after the event sought to be prevented by the request for interim measures takes place; specifically, no appropriate remedy is available to the author now detained in the United States should the State party's domestic courts decide in his favour in the proceedings still pending after his extradition. The Committee thus is not precluded by article 5, paragraph 2 (b), from considering the communication.

8.3 Concerning the State party's argument that its reservation to article 5, paragraph 2 (a), of the Optional Protocol precludes the Committee's consideration of the communication, the Committee notes that the State party's reservation refers to claims submitted to the European Commission on Human Rights. Assuming *arguendo* that the reservation does operate in respect of complaints received, in place of the former European Commission, by the European Court of Human Rights, the Committee refers to its jurisprudence that where the European Court has gone beyond making a procedural or technical decision on admissibility, and has made an assessment of the merits of the case, then the complaint has been "examined" within the terms of the Optional Protocol, or, in this case, the State party's reservation.[24] In the present case, the Committee notes that the Court considered that respect for human rights did not require continued consideration of the case, and struck it out. The Committee considers that a decision that a case is not of sufficient importance to continue its examination after an applicant's action to withdraw the complaint, does not amount to a real assessment of its substance. Accordingly, the complaint cannot be said to have been "examined" by the European Court and the Committee is not precluded by the State party's reservation from considering the claims that were presented under the European Convention but later withdrawn by the author. In the absence of any further obstacles to admissibility, the Committee concludes that the issues raised in the communication are admissible.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 As to the author's claim that the pronouncement in absentia of his conviction and sentence resulted in a violation of article 14 of the Covenant, the Committee notes that in the present case, the author and his legal representatives were present throughout the trial, as arguments and evidence were advanced, and that thus the author self-evidently had notice that judgement, and in the event of a conviction, sentence would be passed. In such circumstances, the Committee, referring to its jurisprudence,[25] considers that no question of a violation of the Covenant by the State party can arise on the basis of the pronouncement of the author's conviction and sentence in another State.

9.3 As to the author's claim that by operation of the "fugitive disentitlement" doctrine he was denied a full appeal, the Committee notes that, on the information before it, it appears that the author - by virtue of being extradited on fewer than all the charges for which he was initially sentenced - will, according to the rule of specialty, be re-sentenced. According to information supplied to the State party, such a re-sentencing would entitle the author fully to appeal his conviction and sentence. The Committee thus need not consider whether the "fugitive disentitlement" doctrine is compatible with article 14, paragraph 5, or whether extradition to a jurisdiction where an appeal had been so denied gives rise to an issue under the Covenant in respect of the State party.

9.4 As to whether the State party's extradition of the author to serve a sentence of life imprisonment without possibility of early release violates articles 7 and 10 of the Covenant, the Committee observes, as set out in its preceding paragraph, that the author's conviction and sentence are not yet final, pending the outcome of the re-sentencing process which would open the possibility to appeal against the initial conviction itself. Since conviction and sentence have not yet become final, it is premature for the Committee to decide, on the basis of hypothetical facts, whether such a situation gave rise to the State party's responsibility under the Covenant.

9.5 In the light of these findings, it is unnecessary to examine the author's additional claims which are based on either of the above elements having been found to be in violation of the Covenant.

9.6 Concerning the author's claim that, in the proceedings before the State party's courts, he was denied the right to equality before the law, the Committee observes that the author obtained, after submission of the case to the Committee, a stay from the Administrative Court to prevent his extradition until the Court had resolved the author's challenge to the Minister's decision directing his extradition. The Committee observes that although the order to stay was duly communicated to the relevant officials, the author was transferred to United States jurisdiction after several attempts, in violation of the Court's stay. The Court itself, after the event, observed that the author had been removed from the country in violation of the Court's stay on execution and that there was no legal foundation for the extradition; accordingly, the proceedings had become moot and deprived of object in the light of the author's extradition, and would not be further pursued. The Committee further notes that the Constitutional Court found that the author's inability to appeal an adverse judgement of the Upper Regional Court, in circumstances where the Prosecutor could, and did, appeal an earlier judgement of the Upper Regional Court finding the author's extradition inadmissible, was unconstitutional. The Committee considers that the author's extradition in breach of a stay issued by the Administrative Court and his inability to appeal an adverse decision of the Upper Regional Court, while the Prosecutor was so able, amount to a violation of the author's right under article 14, paragraph 1, to equality before the courts, taken together with the right to an effective and enforceable remedy under article 2, paragraph 3, of the Covenant.

10.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Austria of article 14, paragraph 1 (first sentence), taken together with article 2, paragraph 3, of the Covenant. The Committee reiterates its conclusion that the State party breached its obligations under the Optional Protocol by extraditing the author before allowing the Committee to address whether he would thereby suffer irreparable harm, as alleged.

11.1 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In the light of the circumstances of the case, the State party is under an obligation to make such representations to the United States authorities as may be required to ensure that the author does not suffer any consequential breaches of his rights under the Covenant, which would flow from the State party's extradition of the author in violation of its obligations under the Covenant and the Optional Protocol. The State party is also under an obligation to avoid similar violations in the future, including by taking appropriate steps to ensure that the Committee's requests for interim measures of protection will be respected.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The author relies for this proposition on a decision of another United States District Court in *United States v. Bakhtiar* 964 F Supp 112. That case held that, when a person was extradited on fewer charges than s/he had been convicted of, the original conviction and sentence remained intact, but an application for habeas corpus would lie against the executive once sentence had been served in respect of the extraditable offences (see further paragraphs 4.5 (final sentence) and 5.4).

[2] "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."

[3] The author provides the terms of the Treaty which provide: "Convictions in absentia.

> If the person sought has been found guilty in absentia, the executive authority of the Requested State may refuse extradition unless the Requesting State provides it with such information or assurances as the Requested State considers sufficient to demonstrate that the person was afforded an adequate opportunity to present a defence or that there are adequate remedies or additional proceedings available to the person after surrender."

[4] Article 37 of the European Convention provides, so far as is material, "1. The Court may decide at any stage of the proceedings to strike an application out of its list of cases where the circumstances lead to the conclusion that:

> (a) the applicant does not intend to pursue his application; ...

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

[5] Case No. 716/1996, Views adopted on 30 April 1999.

[6] CCPR/C/SR.1352 (discussing at a preliminary stage the case of *Ashby v. Trinidad and Tobago* Case No. 580/1994, Views adopted on 21 March 2002).

[7] *Electricity Company of Sofia and Bulgaria* PCIJ Series A/B No. 79, at p. 199.

[8] *Germany v. United States (La Grand)*, judgement of 27 June 2001.

[9] Case No. 538/1993, Views adopted on 16 December 1996.

[10] *Asensio López v. Spain* Case No. 905/2000, Decision adopted on 23 July 2001; *Wan Kuok Koi v. Portugal*, Case No. 925/2000, Decision adopted on 22 October 2001.

[11] *Ng v. Canada* Case No. 469/1991, Views adopted on 5 November 1993; *Cox v. Canada*, Case No. 539/1993, Views adopted on 31 October 1994.

[12] *Raf v. Spain*, Appl. No. 53652/00, judgement of 21 November 2001, and *Eid v. Italy*, Appl. No. 53490/99, judgement of 22 January 2002.

[13] *Maleki v. Italy* Case No. 699/1996, Views adopted on 15 July 1999.

[14] *Vuolanne v. Finland* Case No. 265/1987, Views adopted on 7 April 1989.

[15] In *Einhorn v. France*, Appl. No. 71555/01, judgement of 16 October 2001, the Court stated: "… it is not to be excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under article 3 of the Convention".

[16] *Cox v. Canada*, op. cit., at para 10.3.

[17] Case No. 869/1999, Views adopted on 19 October 2000.

[18] *Ashby v. Trinidad and Tobago*, op. cit.; *Mansaraj et al. v. Sierra Leone*, Case No. 839/1998, Views adopted on 16 July 2001; *Piandiong et al. v. The Philippines*, op. cit.

[19] The author refers to the jurisprudence of the European Court for the proposition that disproportionate sentences can be inhuman: *Weeks v. United Kingdom* (1988) 10 EHRR 293; *Hussain v. United Kingdom* (1996) 22 EHRR 1.

[20] Op. cit.

[21] *Detlef* 45 BVerfGE 187 (1977). To similar effect, the Namibian Supreme Court determined in *State v. Tcoeib* (1996) 7 BCLR 996 that life sentence without parole was unconstitutional.

[22] Op. cit. (death by gas asphyxiation) and further *Soering v. United Kingdom* 11 EHRR 439 (overall death-row phenomenom).

[23] *Altun v. Germany*, App. No. 10308/83 DR 209; *Nivette v. France*, judgement of 3 July 2001; *Einhorn v. France*, op. cit.

[24] See, for example, *Linderholm v. Croatia* Case No. 744/1997, Decision adopted on 23 July 1999.

[25] See, for example, *Maleki v. Italy*, op. cit.

VI. DECISIONS OF THE HUMAN RIGHTS COMMITTEE DECLARING COMMUNICATIONS INADMISSIBLE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Communication No. 693/1996, *Nam v. Korea**
(Decision adopted on 28 July 2003, seventy-eighth session)

Submitted by:	Gi-Jeong Nam (represented by counsel Mr. Suk Tae Lee)
Alleged victim:	The author
State party:	Republic of Korea
Date of communication:	14 February 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 July 2003,

Having concluded its consideration of communication No. 693/1996, submitted to the Human Rights Committee on behalf of Mr. Gi-Jeong Nam under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 14 February 1996, is Mr. Gi-Jeong Nam, a Korean national born 20 October 1959. He claims to be a victim of a violation by the Republic of Korea, of article 19, paragraph 2, of the International Covenant on Civil and Political Rights. He is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The text of the one individual opinion signed by Committee member Mr. Hipólito Solari Yrigoyen is appended to the present document.

The facts as presented by the author

2.1 In 1989, the author, a national language (Korean literature) teacher in a Seoul middle school and representative of an organization concerned with improving national language education called "Teachers for a National Language Education", started work on a new national language curricular textbook intended for publication. Subsequently, he and the other members of his organization realized that the relevant education laws (article 157 of the Education Act and article 5 of the Education Decree (Presidential Decree on Educational Curricular Materials)) prohibited the independent publication of middle school national language curricular textbooks.

2.2 The author brought a constitutional challenge against the relevant education laws in the Constitutional Court of Korea.[1] He contended that, by restricting the authorship of curricular education materials and textbooks, and by delegating comprehensive authority to the Ministry of Education for this purpose, the laws violated his rights to independent and professional education. Moreover, the laws prohibiting non-governmental publication of curricular materials violated the author's constitutional right to freedom of expression. The author also claimed a breach of article 22, paragraph 1, of the Constitution (right to freedom of learning and arts), in that the relevant education laws made it impossible for teachers to research and develop ways to improve methods of education.

2.3 On 12 November 1992, the Constitutional Court dismissed the author's application, finding no impropriety in the restrictions contained in the relevant education laws.

The complaint

3. In his communication, the author complains that the prohibition of non-governmental publication of middle school national language textbooks which prevents him from pursuing publication of his curricular textbook, violates his right to freedom of expression guaranteed by article 19, paragraph 2, of the Covenant. He points out that middle school teachers and students studying Korean as a national language rely almost exclusively on textbooks, and that writing such a curricular textbook was the only effective way of communicating his ideas concerning middle school national language education. Article 19, paragraph 2, of the Covenant, it is claimed, encompasses his right to express his professional knowledge in the form of curricular textbooks.

The State party's observations with regard to the admissibility of the communication

4.1 The State party, by submission of 11 June 1996, objects to the admissibility of the communication on grounds of non-exhaustion of domestic remedies, arguing that, notwithstanding the rejection of the author's constitutional complaint by the Constitutional Court, other domestic remedies remain open to the author. In particular, articles 26 and 29, respectively, of the Korean Constitution provide a right to petition and a right to claim from the State compensation.

4.2 Article 26 of the Constitution confers on all citizens the right to petition any State organization, according to law, and provides that the State must examine all such petitions. Under article 4 of the Petition Act, a petitioner may seek enactment, amendment or repeal of any law, order or regulation.

4.3 Article 29 of the Constitution as implemented by the National Compensation Act, which stipulates that any person who sustains damage by an unlawful act committed by a public official in the course of official duties may claim just compensation from the State or public organization, according to law. The State party contends that the author must claim appropriate compensation for the alleged violation of his basic rights before domestic remedies can be said to have been exhausted.

The author's response to the State party's observations

5.1 The author, by submission of 20 July 1996, argues that neither the right to petition nor the right to claim compensation would afford him an effective remedy in his case.

5.2 As to the right of petition, the author points out that, as the law in question has been interpreted, an action by an agency on a petition has no legally binding effect. Moreover, the agency cannot act on a petition in a way contrary to law, if that law is constitutional. Since the Constitutional Court has determined the constitutionality of the relevant education laws and has dismissed the author's claim, he is precluded from using any other legal remedy to object to the relevant education laws.

5.3 The author also argues that he cannot seek compensation from the State under the National Compensation Act, for governmental action pursuant to a law, unless the relevant law is shown to be unconstitutional, which is not the case, since the author's constitutional claim was rejected by the Court. Moreover, under the State party's law, the compensation process generally applies only in respect of specific illegal acts committed by officials, rather than in respect of a law itself.

5.4 By submission of 4 March 1997, the author also states that, by implication, the Constitutional Court itself found that there is no remedy available for the alleged violation of his rights, since, under article 68, paragraph 1, of the Constitutional Court Act, the Court would not have considered the merits of his claim if there was any such remedy available to him.

The State party's and author's further comments

6.1 The State party, by submission of 30 July 1997, accepts that the Constitutional Court's decision to adjudicate upon the merits of the constitutional claim implies that there are no *judicial* remedies remaining to be exhausted, but it does not imply that there are no existing legislative or administrative remedies. The author therefore should have exercised his right of petition to the appropriate body or sought compensation under the National Compensation Act.

6.2 By further submission of 31 January 2001, the author denies the State party's contention that the Constitutional Court adjudicating on the merits of his claim implies only that no judicial remedies remain to be exhausted. In his view, the plain wording of the Constitutional Court Act cover all remedies, including administrative or legislative remedies. The Court does not adjudicate a case if any effective remedy, of whatever type, still remains available to the petitioner.

6.3 The author also asserts that since the Court's decision binds all organs of the State party, including legislative and administrative organs, any appeal to those bodies would be ineffectual and without any prospect of success. Therefore, he cannot be required to exhaust legislative or administrative remedies, including those under the Petitions Act or National Compensation Act.

Decision on admissibility

7. At its seventy-second session, the Committee considered the admissibility of the communication. Having ascertained that the same matter was not being examined and had not been examined under another procedure of international investigation or settlement, the Committee examined the question of exhaustion of domestic remedies and noted that the State party had accepted that the decision of the Constitutional Court on the merits of the author's application meant that no further judicial remedies were available to him; accordingly, the Committee found that judicial remedies had been exhausted in this case. With regard to the State party's contention that administrative remedies under the National Compensation Act and the Petitions Act remained available, the Committee considered that, even if such remedies were theoretically available after the Constitutional Court's decision, the State party had not shown that, in the circumstances, these remedies could be effective. Accordingly, the Committee found that the author had exhausted all such remedies as were available and effective, and that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been met. On 3 July 2001, the Committee therefore declared the communication admissible.

State party's observations on the merits

8.1 By submission of 22 February 2002, the State party commented on the merits of the communication.

8.2 The State party notes that many countries have adopted some form of state authorship or censorship on educational curricular materials used in elementary and secondary schools and argues that these principles constitute necessary measures to examine the educational suitability of material that may be used in school curricula (a system that is not applied at the college and university level). Moreover, these measures are intended to maintain political and religious neutrality in education, to secure the "universal validity" of education by avoiding factual errors or "prejudices", and to substantially guarantee the students' right to learn.

8.3 Regarding the compatibility of article 157 of the Education Act with article 19 of the Covenant, the State party emphasizes that state authorship and the system of examination or approval by its Ministry of Education is not intended to prohibit the publication of non-governmental books, but to ensure that books used for educational curricula are of suitable quality. In this case, the author, who compiled material at his own discretion, was prohibited from using his textbook in the classroom, but retained the right to publish it as reference tool for teachers and students. He could thus still enjoy his right to freedom of expression guaranteed by article 19 of the Covenant.

8.4 Moreover, although article 19 of the Covenant addresses the author's right to express his professional knowledge in the form of curricular textbooks, the State party may impose restrictions on this right within the limits laid down in article 19, paragraph 3, of the Covenant. In this respect, the necessity of state censorship, as described above, constitutes a restriction to protect public morals in the sense of article 19, paragraph 3 (b), of the Covenant. The State party therefore declares that "[s]ince the aforementioned necessity of state censorship constitutes 'the protection of public morals', prohibiting non-governmental publication is compatible with the Covenant".

8.5 The State party concludes that the communication is without merits and that the author's request to annul or revise the legislation in question as well as his claim for compensation cannot be sustained.

8.6 The State party finally draws attention to its efforts to promote the right to freedom of expression. Its plans are gradually to replace state authored educational curricular material for elementary and secondary schools with material examined or approved by the government. The government's long-term plan is to improve its system on educational curricular material to eventually allow free publication.

Author's comments

9.1 By submission of 2 December 2002, the author commented on the State party's merits submission.

9.2 According to him, the State party admits that, since the Korean Government reserves sole authorship for textbooks of national language pursuant to the Education Act, he is prohibited from publishing his own textbook and using compilations of material related to national language education.

9.3 The author disputes that state authorship of textbooks is a better safeguard for "political and religious neutrality" than if the authorship was granted to citizens. He argues that state authorship for textbooks has historically been used in many countries, particularly in dictatorships, to orient education in accordance with government policy. In the State party, which was under military rule for a long period, textbooks were used as a means to justify government policy.

9.4 The author considers that "political and religious neutrality" is adequately preserved in open democratic societies that guarantee people's right to freedom of expression, including the right to publish textbooks. Moreover, the State party's Constitution contains no reference to a state religion and textbooks of national language are not related to a specific religion. The State party would fully preserve "political and religious neutrality" by allowing a system under which the state would choose textbooks. Such a system would allow citizens to publish a textbook and its use in schools would be conditioned to governmental approval. By so providing, the state would maintain "political and religious neutrality".

9.5 The author re-emphasizes the absence of any relationship between textbooks on national language education and the protection of "public morals" in the sense of article 19, paragraph 3 (b), of the Covenant. Courses on national language are merely designed to teach students to read and write national language and literature. Furthermore, there is a separate curricular textbook on "public morals", which is also subject to exclusive state authorship and is used by the government to protect those "public morals".

9.6 The author considers that even assuming that the State party's assertion related to the protection of "public morals" is correct, the State party would retain its ability to protect "public morals" with a system of approval of non-governmental textbooks.

9.7 The author therefore concludes that exclusivity of state authorship for national language textbooks is in violation of article 19, paragraph 2, of the Covenant.

Review of the admissibility decision

10. In the light of the submissions by the parties, the Committee observes that the communication, as construed by the parties, does not relate to a prohibition of non-governmental publication of textbooks as was originally complained of (para. 3) and found admissible by the Committee (para. 7). Rather, the communication relates to the author's allegation that there is no process of scrutiny in place for the purpose of submitting non-governmental publications for approval by the authorities, for their use as school textbooks. While affirming that the right to write and publish textbooks intended for use at school falls under the protection of article 19 of the Covenant, the Committee notes that the author claims that he is entitled to have the textbook prepared by him scrutinized and approved/rejected by the authorities for use as a textbook in public middle schools. This claim, in the Committee's opinion, falls outside the scope of article 19 and consequently it is inadmissible under article 3 of the Optional Protocol.

11. Accordingly, the Human Rights Committee, acting under rule 93, paragraph 3, of its rules of procedure:

(a) Reverses its decision of 3 July 2001, declaring the communication admissible;

(b) Decides that the communication is inadmissible under article 3 of the Optional Protocol;

(c) Decides that a copy of the present decision shall be sent to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present document.]

Note

[1] The constitutional provisions pleaded by the author were articles 21 (1) ("All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association"), 22 (1) ("All citizens shall enjoy freedom of learning and the arts"), and 31 (4) ("Independence, professionalism and political impartiality of education and the autonomy of institutions of higher learning shall be guaranteed under the conditions as prescribed by law") [all translations by author].

APPENDIX

Individual opinion by Committee member Mr. Hipólito Solari Yrigoyen (dissenting)

I disagree with the present communication on the following grounds:

1. The Education Act referred to in article 157, paragraph 1, provides that: "The educational curricular materials of each type of schools … shall be restricted to those materials whose copyright belongs to the Ministry of Education or to those examined or approved by the Ministry of Education." The Presidential Decree on Educational Curricular Materials states that teaching materials may be compiled by the Ministry of Education or, when deemed necessary by the Minister of Education, subcontracted to research institutions or universities. Although it may be inferred from article 157 that private individuals may prepare materials and submit them to the Ministry for approval, the State party has denied this possibility on the grounds that state censorship is a restriction designed to protect public morals within the meaning of article 19, paragraph 3 (b), of the Covenant.

2. The Committee considers that, although restrictions on freedom of expression and on the dissemination of information and ideas of all kinds in print may be established by law for reasons of public morals, such restrictions cannot lead to disregard for the right provided for in article 19, paragraph 2, of the Covenant. The fact that an author has no possibility of submitting a middle school national language textbook to the authorities for approval or, as the case may be, rejection on valid grounds constitutes a restriction which goes beyond the restrictions provided for by article 19, paragraph 3, of the Covenant, as well as disregard for the right to freedom of expression.

3. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant.

4. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including the right to submit his middle school national language textbook to the competent educational authorities for scrutiny and possible approval, with a view to its possible use in the classroom. The State party is also under an obligation to prevent similar violations in future.

(*Signed*): Hipólito Solari Yrigoyen
7 August 2003

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present document.]

B. Communication No. 743/1997, *Truong v. Canada**
(Decision adopted on 28 March 2003, seventy-seventh session)

Submitted by:	Ngoc Si Truong (represented by counsel Mr. Ian White)
Alleged victim:	The author
State party:	Canada
Date of communication:	26 April 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 2003,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Ngoc Si Truong, born in Viet Nam on 31 March 1964 but currently allegedly stateless, and under order of deportation from Canada at the time of submission of the communication. He claims to be a victim of a violation by Canada of articles 2, paragraphs 3 (a) and (b), 6, paragraph 1, 7, 9, 13, 17 and 23, paragraphs 1 and 2, of the Covenant. He is represented by counsel.

The facts as presented

2.1 In May 1978, the author fled Viet Nam illegally for fear of being drafted into the Vietnamese armed forces in the armed conflict with Cambodia. The author's father had been a general in the former South Vietnamese forces and died in 1975. On 20 October 1980 (aged 16 years), the author arrived in Canada and was granted permanent resident status. On his immigration record and permanent residence visa documentation, he is listed as "apatride/stateless". In April 1985, the author was convicted of assault causing bodily harm and aggravated assault, and sentenced, concurrently, to nine months' imprisonment and two years' probation. In 1988, he was (i) convicted of breaking and entering and theft, as well as assault with a weapon, for which he received consecutive sentences of four months' and two months' imprisonment, (ii) convicted of assault causing bodily harm, for which he was sentenced to one year's imprisonment and probation of two years, (iii) convicted of operating a motor vehicle while impaired, for which he was sentenced to seven days' imprisonment and a fine. In June 1991, the author travelled to Viet Nam on Canadian documentation on a limited term visitor's visa, and married a Vietnamese national who applied for Canadian permanent residence on the basis of her relationship with the author.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Under rule 85 of the Committee's rules of procedure, Mr. Maxwell Yalden did not participate in the examination of the case.

2.2 By virtue of his criminal offences, the Canadian authorities on 8 July 1992 ordered the author's deportation pursuant to s. 27 of the Immigration Act, which requires the deportation of permanent residents who have been convicted of serious criminal offences. In 1993, he was convicted of operating a motor vehicle while impaired; he was sentenced to 14 days' imprisonment. On 15 July 1993, the author's appeal to the Appeals Division of the Immigration and Refugee Board, based on "the existence of compassionate or humanitarian considerations", was dismissed. The author then sought leave to apply for judicial review to the Federal Court. However, his counsel at the time inadvertently failed to request written reasons for decision from the Appeals Division within the 10-day limit provided, and as a result the Appeals Division refused to supply its reasons once requested thereafter. On 10 November 1993, the Federal Court dismissed the author's application for failure to supply an application record (including the Appeals Division's reasons for decision).

2.3 On 20 December 1993, the Canadian authorities refused his wife's application for permanent residence (which, according to the author, would otherwise likely have been approved) on the basis of the deportation order against the author. On 21 December 1993, the author submitted to the Federal Court a motion for reconsideration of its decision of 10 November 1993 to reject the author's application for judicial review. On 18 April 1994, the Federal Court dismissed the motion. On 4 March 1994, the author appealed against the refusal of his wife's application to the Immigration and Refugee Board.

2.4 On 5 July 1994, the author's new counsel made a further request to the Appeals Division for the written reasons his case was dismissed. On 21 July 1994, counsel was advised that the time limit for requesting reasons had passed and would not be supplied. On 12 September 1994, counsel requested from the Appeals Division an order extending the time available to request written reasons. On 5 October 1994, the Appeals Division refused the request. An application for leave and judicial review of this decision was filed with the Federal Court on 25 October 1994.

2.5 On 9 March 1995, the Federal Court dismissed the application, without reasons given. No further appeal is available, and the author submits that all effective and available domestic remedies have been exhausted. In 1995, the author was charged with breaking and entering, possession of a restricted weapon, carrying a concealed weapon, careless handling of a firearm, possession of a prohibited weapon, and various other related charges.[1]

The complaint

3.1 The author argues that his removal to a country where he allegedly has no legal status would amount to cruel, inhuman and degrading treatment contrary to article 7. He submits that as a result of his illegal departure from Viet Nam and the loss of his Canadian permanent residency status, he has become stateless. As a result, he would, upon deportation to Viet Nam, be unable to work, reside or otherwise enjoy the rights associated with employment. He points out that when he travelled to Viet Nam in 1991, he was required to obtain a visa for four months and was not allowed to engage in employment. He submits that he may be imprisoned in a "re-education camp" upon return as a result of his illegal departure and his father's involvement in the former South Vietnamese Government. The author refers to the committee's general comment No. 20 on article 7, where the Committee considered that both the "dignity and the physical and mental integrity of the individual" was protected by this article. He also refers to jurisprudence of the Committee and the European Court of Human Rights finding that psychological torture and pressure may be subsumed under this provision.[2]

3.2 He also alleges, under article 7, that his removal would amount to a destruction of his family life and that his family would suffer anguish as a result. He lists three sisters, three brothers-in-law, six nieces, three nephews and five others (of unspecified relationship) in Canada from whom he would be separated. He contends that the Committee has recognized that anguish and suffering to family members may be in violation of the Covenant.[3]

3.3 The author further alleges that, for the reasons advanced above, his deportation would violate his right to security and liberty of the person (art. 9). He argues that "liberty" includes the right to establish a home and bring up children. He further refers to the right to life, liberty and security of the person provisions contained in the Canadian Charter of Rights and Freedoms and contends that this includes the right to pursue any lawful livelihood or lawful occupation without unreasonable government interference.

3.4 The author complains that his deportation would be arbitrary and contrary to article 13, taken in conjunction with article 2, paragraphs 3 (a) and (b), as it is not in accordance with law and does not respect the safeguards contained in article 13. Referring to the Committee's general comment No. 15 on article 13, he argues that the Committee has interpreted broadly the right against arbitrary expulsion. In his case, the Appeals Division's refusal to issue written reasons for its decision denied him the opportunity to challenge the legality of his deportation order in the Federal Court. He argues that the Appeals Division's decision should be subject to judicial review, given the consequences of the decision, and to ensure the objectivity and independence of the decision maker. He alleges, with reference to the Committee's jurisprudence, that he has not been afforded an effective remedy to challenge his expulsion and that there are no compelling reasons of national security to deprive him of such a remedy.[4]

3.5 Finally, the author alleges that his deportation would amount to a disproportionate interference with his right to home and family life, infringing his rights under articles 17, paragraphs 1 and 2, and 23, paragraphs 1 and 2. He alleges that his separation by deportation from close family members is disproportionate to his criminal record, and that it is unreasonable to deport someone who arrived in Canada at age 16. Referring to his wife's (refused) application for residence and the author's close family members in Canada, he contends that a situation of family dependency upon the author has been established in Canada. In these circumstances, a broad interpretation of the notion of "family" should be applied,[5] and that protection of the family outweighs the State's desire to deport him. He submits that articles 17 and 23 should also be given a broad interpretation where legal obstacles to creation of family life and a fear of persecution exist in a country a person is being returned to. Due to his statelessness, he will be unable to remain indefinitely in Viet Nam and support a family.

3.6 The author contends that jurisprudence of the European Court has prohibited the deportation of individuals with criminal convictions on the grounds of family relationships.[6] Although denial of family rights may be cruel or degrading treatment contrary to article 12 of the Canadian Charter, he contends there are no effective domestic remedies available for the rights in issue.

The State party's submissions on the admissibility of the communication

4.1 By submissions of 4 July 1997, the State party contested the admissibility of the communication, arguing that the author had failed to demonstrate, on the facts, that he would prima facie be a victim of a violation by Canada of any of the provisions of the Covenant if he were to be returned to Viet Nam. It is therefore unsubstantiated, incompatible with the provisions of the Covenant and inadmissible.

4.2 The State party points out that, while 200,000 people are granted permanent residence each year, there is no right to the grant or retention of such status, and conditions of compliance may be set. These conditions, for the most part, reflect the State party's concerns for the health and safety of its citizens, the security of its institutions, and the administration of its law. As to the author's personal circumstances in Canada, the State party points out that the author has been living with one of his sisters and her family, while his employment history has been erratic. The State party observes that it has requested travel papers for the author from Viet Nam, with which it concluded a Memorandum of Understanding, on 4 October 1995, to accept the return of Vietnamese citizens without any other citizenship who violated Canadian law and are subject to deportation. At the time of submission, Viet Nam had accepted 15 such persons, and the author's return is under active consideration by that country.

4.3 As to the author's claims under article 7, the State party argues that the scope of this provision is not as broad as claimed. Reasoning by analogy with *Vuolanne v. Finland*,[7] the State party argues that the treatment complained of must amount to more than deportation or its natural consequences. There must be substantial grounds for believing that the author's rights under article 7 would be violated in the receiving country. In this case, the author has given no evidence to refute UNHCR claims that Vietnamese returnees are well treated,[8] nor is his claim that he might be imprisoned in a re-education camp more than pure speculation. The State party points out that the author did not hesitate to return to Viet Nam several years ago to marry, and it does not appear that at that time, he was subject to any discriminatory action by the Vietnamese authorities, much less action that would trigger the article 7 threshold.

4.4 The State party rejects that the author is stateless, pointing out that in four documents placed before the Committee by the author, he is identified as a Vietnamese national (in his Vietnamese marriage certificate, his affidavit to the Immigration and Refugees Board, his memorandum of argument to the same Board and his memorandum of argument before the Federal Court). He has provided no evidence that he has lost Vietnamese citizenship, or that he could not work in Viet Nam and support a family. Indeed, he has recently married a Vietnamese national, whose right of abode there would enable the author to enjoy family life there. While the author would be inconvenienced in terms of his relationships with his sisters in Canada, his mother and, apparently, two brothers also continue to reside there, further reducing the negative impact of his removal.

4.5 Concerning article 9, the State party argues that the author would not be deprived in Viet Nam of any of the rights that he identifies as inherent in that article. As a citizen of Viet Nam, he would be entitled to all the rights of that country if returned. While the valid removal of an alien affects the removal of an alien to move freely within the removing State, there is no violation of article 9 where the removal is otherwise lawful and consistent with the Covenant.

4.6 As to the author's claims under articles 13 and 2 concerning arbitrary expulsion, the State party recalls that the author was convicted of serious criminal offences, thereby breaching an important condition attached to his continued residence as an alien. He was ordered removed following an oral hearing with full procedural safeguards. The decision by the Appeals Division to reject his appeal was taken in accordance with law and having regard to all the circumstances of the case, and cannot be said to be arbitrary or inconsistent with the Covenant. The author had multiple legal opportunities to obtain the Appeals Division's reasons, and failed to do so either through inadvertence or due process of law.

4.7 The State party points out that the Appeals Division hears too many cases to make it practicable to issue written reasons for its decision automatically. If requested within a certain time frame, however, they must be supplied. The time limit is to ensure an accurate rendition of the decision, and to be consistent with the time frames for further appeals from the Appeals Division's decisions and for other decisions under the Immigration Act. At each stage of the process, the author was represented by counsel, while the adjudicators, Appeals Division members and Federal Court judges deciding in the author's case were all independent. Thus, the deportation decision was reached in accordance with the law, and the author had ample opportunity to seek review of that order, as required by article 13. The State party submits that the judicial review available to the author satisfied its obligations under article 2, and that any violation of Covenant rights would have found an effective remedy before competent judicial authorities.

4.8 As to the author's claims under articles 17 and 23, the State party repeats that he is a Vietnamese national with corresponding rights, and that a number of close family members, including his wife, mother and two brothers, live in Viet Nam. He has demonstrated no family dependency on him in Canada - indeed, he lives in the home of a sister and her family. The State party submits that the scope of the Covenant's protection of the family in the immigration context is defined by articles 13, 17 and 23 read together, such that a State, when considering removal of aliens, should balance the individual's family interests against the interests of the State. To that end, full consideration was given to the author's family circumstances throughout the entire decision-making process. Considerations such as age, length of time spent in Canada, presence of close family members in Canada and abroad, degree of integration into Canadian society and successful establishment in Canada are mandatory in the decision-making. The decisions made were not arbitrary and procedural guarantees were fully met. The State party submits that the same considerations were applied in the present case as in the case of *Stewart v. Canada*,[*] where the Committee found no violations of articles 17 and 23 of the Covenant, and that in fact the present facts show a far weaker family connection with the removing country than was the case in *Stewart*.

4.9 As to the author's claim under article 6, paragraph 1, the State party contests the relevance of this provision to the case. The author has not suggested that his case falls into the categories of death penalty, infant mortality, deaths at the hands of State authorities or similar circumstances that the Committee has previously examined in relation to article 6. The author's right to life is not threatened in either Canada or Viet Nam.

The author's comments

5.1 By letter of 27 October 1997, the author responded to the State party's submissions, pointing out that in the State party's immigration documentation he is identified as "apatride/stateless". It is thus not open to the State party to contend that he possesses Vietnamese citizenship when its documentation acknowledges him as stateless. He also points out that when he travelled to Viet Nam in 1991, he was first required to obtain a visitor's visa for a four-month period only and was not allowed to pursue employment during his stay.

Supplementary submissions

6.1 By submissions of 16 March 1998, the State party responded to the author's comments, pointing out that the author does not deny that he remains a citizen of Viet Nam, and that the Vietnamese Government would not accept him unless he was a citizen. The 1995 Memorandum of Understanding only requires Viet Nam to accept its citizens, if they have been convicted in Canada of criminal activity. Viet Nam would not issue a passport or other documentation to the author if he were not a citizen.

6.2 The State party points out that the designation "apatride/stateless" is typically used in its immigration documentation to indicate that the person concerned is outside his/her State of nationality, is not carrying a travel document issued by that country, and is unwilling to return to that country. The officials completing such documentation do not have the capacity to determine whether the individual in question is, in law, stateless. The State party continues to consider the author a Vietnamese citizen, and conducts discussions with Viet Nam about the author's return on that basis.

6.3 The State party recalls that the author's marriage certificate, issued by the Vietnamese authorities, identifies him as a Vietnamese national. Indeed, the author swore in his affidavits before the Immigration and Refugee Board and before the Federal Court that he was Vietnamese.

6.4 On 22 April 1998, the State party's supplementary submissions were transmitted to the author's counsel, with an invitation to comment. Despite being further invited by reminders of 25 September 2000 and 12 October 2001, no further comments were received from the author's counsel.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee observes that the State party objects to the admissibility of the communication solely on the ground that it is unsubstantiated and/or that the author's claims fall outside the scope of the Covenant. At the outset, the Committee notes that it does not need to determine whether the author is, in fact, stateless or not. If he is not a Vietnamese citizen, then, on the basis of the information before it, he is not liable to removal to Viet Nam under the terms of the Memorandum of Understanding and, at least at the present time, his communication would be moot and devoid of object. The Committee therefore proceeds, for the sake of argument, on the basis most favourable to the author, namely that the author *is* liable to deportation to Viet Nam.

7.3 As to the claim under article 6, the Committee notes that the author has not advanced any argumentation whatsoever in support of his claim under this provision, and accordingly finds this claim inadmissible as manifestly unsubstantiated.

7.4 As to the claims under articles 2, 7, 9, 13, 17 and 23, the Committee observes that the author's arguments fall into two categories. Firstly, he argues that his removal would separate him from family in Canada, render him, partly due to his being a non-citizen, unable to pursue his own family life in Viet Nam and expose him to deprivations of other rights there. Secondly, he argues that the deportation process in Canada was flawed. On the first point, the Committee notes that, as a Vietnamese citizen, the author would be entitled to reside, work and support a family in Viet Nam; indeed, he married a Vietnamese citizen there without any difficulty in 1991. Given the presence of his wife, mother and two brothers, the author has failed to demonstrate that his removal would, in terms of articles 17 and 23, raise arguable issues of family life under the Covenant. In the light of the Committee's decision in *Stewart*, where, in a case concerning the removal of an individual who had been in Canada for a longer period and from a younger age, and where apart from a single brother the individual's entire family resided in Canada, the Committee found no violation of (inter alia) articles 7, 9, 13, 17 and 23, the author has failed to substantiate his claims on the facts.

7.5 As to the claim under article 7 of the Covenant, the Committee considers that the author has not substantiated, beyond a simple allegation, that he faces a real risk of abusive treatment by the Vietnamese authorities that would raise additional issues under article 7. In this connection, the Committee notes (i) that the author's comments on the State party submissions did not respond to its contention that he was not at risk of such treatment, and (ii) that despite repeated invitations to comment on the State party's supplementary submissions, the author did not take those opportunities to further substantiate this claim. In the light of the preceding paragraphs, the Committee accordingly concludes that the author has failed to substantiate, for purposes of admissibility, his claims of a violation of articles 7, 9, 17 and 23 of the Covenant.

7.6 As to the processes before Canadian immigration and judicial authorities, the Committee notes that the author, aided by counsel, had a full and independent review by the Appeals Division of the decision to deport him. Even if article 13 was to be interpreted to require the possibility of a further appeal, the Committee notes that this was available under the State party's law, provided that the author lodged a timely request for the full decision. The Committee recalls its jurisprudence pursuant to which failure to adhere to procedural time limits for the filing of complaints amounts to failure to exhaust domestic remedies,[10] and concludes that, as a consequence, it would be inappropriate for the author to raise on the merits his subsequent inability, due to inadvertence, to pursue an effective appeal. The Committee accordingly concludes that the author has failed to substantiate, for purposes of admissibility, his claim of a violation of articles 2 and 13 of the Covenant.

8. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] These charges were still outstanding at the time of the State party's submission.

[2] *Miguel Angel Estrella v. Uruguay* Case No. 74/1980, Views adopted on 29 March 1983; *Soering v. United Kingdom* Series A, vol. 161 (1989).

[3] *Almeida de Quinteros et al. v. Uruguay* Case No. 107/1981, Views adopted on 21 July 1983.

[4] *Hammel v. Madagascar* Case No. 155/1983, Views adopted on 3 April 1987.

[5] *Aumeeruddy-Cziffra v. Mauritius* Case No. 35/1978, Views adopted on 9 April 1981.

[6] *Abdulazis et al. v. France, Beldjoudi v. France, Djeroud v. France, Moustaquim v. France.*

[7] Case No. 265/1987, Views adopted on 7 April 1989.

[8] The State party refers to a three-page facsimile message, dated 4 May 1995, from the Deputy Representative of the UNHCR Branch Office for Canada to an IRB Research Officer on the subject of "Return of Vietnamese asylum-seekers", which concluded that: "From six years of experience in visiting many thousand returnees in over 300 districts and city-wards all throughout Viet Nam, we may state that they are generally treated well with no discriminatory measures taken against them."

[9] Case No. 538/1993, Views adopted on 1 November 1996.

[10] See, for example, *A.P.A. v. Spain* Case No. 433/1990, Decision adopted on 25 March 1994.

C. Communication No. 771/1997, *Baulin v. The Russian Federation*[*]
(Decision adopted on 31 October 2002, seventy-sixth session)

Submitted by: The Center of Assistance to International Protection

Alleged victim: Alexander Baulin

State party: The Russian Federation

Date of communication: 15 July 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2002,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Alexander Baulin, a Russian citizen, born on 29 November 1951, at the time of the submission detained at the Corrective Institution in Rybinsk. He claims to be a victim of a violation by Russia[1] of article 14, paragraphs 1 and 3 (e) of the International Covenant on Civil and Political Rights (the Covenant). He is represented by counsel.

The facts as submitted by the author

2.1 On 25 May 1988 at about 4 p.m., the author, in the state of alcoholic intoxication, entered the apartment of his ex-wife in her absence. The couple, notwithstanding their divorce, had allegedly continued to have sexual relations, which they kept secret from the ex-wife's mother, Ms. Isaeva. While in the apartment, the author heard the voices of the two women from the outside, and in order to avoid meeting his mother-in-law, he hid in a wardrobe. After about an hour and a half in the wardrobe, he accidentally spilt some liquid and was discovered.

2.2 While in the closet he heard his ex-wife criticizing and ridiculing him. When he was discovered, he was in a rage and assaulted his ex-mother-in-law and his ex-wife, with a knife that he had found in the closet. Counsel submits that the injuries inflicted were superficial, since the author only used the flat part of the knife. His ex-wife allegedly ran away from him to the window and cried for help. She then climbed on the window sill, sat on it, lost her balance and fell from the fourth floor to her death. While the author admits the wrongness of his actions during the events that led up to the death of his ex-wife, he denies having sought or participated in her death.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer and Mr. Maxwell Yalden.

2.3 The author's first court hearing took place from 28 December 1988 to 12 January 1989. The author was charged with having committed a premeditated murder under aggravating circumstances pursuant to articles 102 (g) and 193 (2) of the Criminal Code. However, the court found the evidence insufficient to convict him, and ordered an additional pre-trial investigation. In a second court hearing that took place on 29 June 1989, following the new pre-trial investigation, the author was charged and convicted pursuant to article 102 (g)[2] of the Criminal Code, and sentenced to eight years of imprisonment. This sentence was appealed by both the mother of the deceased and the author. On 14 March 1990, the Moscow City Court found Mr. Baulin guilty pursuant to articles 102 (g) and 193 (2) of the Criminal Code, for having committed a premeditated murder under aggravating circumstances, and sentenced him to 13 years of imprisonment in a strict regime labour camp.

2.4 The case for the Prosecution was that Mr. Baulin visited his wife on 25 May 1988, inflicted injuries with a knife and subsequently pushed her out of the window of the flat. She died on the spot. The main eyewitness, Mr. Baulin's former mother-in-law, gave evidence during the trial, blaming Mr. Baulin for pushing her daughter out of the window. Ms. Baulin's neighbours, Mr. and Ms. Novitsky, had seen Ms. Baulin falling from her apartment on the fourth floor window as though she had been pushed. Other witnesses testified that they had seen her falling out of the window but that they had not seen anyone push her. The medical and other expert testimony was inconclusive.

2.5 The author points out that in her first statement to the police, Mr. Baulin's ex-mother-in-law testified that she had tried to pull Mr. Baulin away from her daughter while he was stabbing her. Her daughter then broke away and sat on the window sill, crying for help. The ex-mother-in-law tried to unlock the door to seek help outside and when she turned around, her daughter had fallen down. Only after the funeral, did she change her testimony to the effect that Mr. Baulin had come to the apartment with the intention to kill her daughter and that he had grabbed her, placed her on the window sill and then pushed her. She then changed the details of her testimony on several occasions. According to counsel, this makes the witness' evidence unreliable and Mr. Baulin's conviction unsafe. Moreover, several of the Baulin's acquaintances testified in court that Ms. Isaeva, even at her daughter's funeral, had not yet voiced the version of the author's guilt in Ms. Baulin's fall out of the window, and a neighbour of Ms. Isaeva, Mr. Monakov, stated on 25 June 1988, that Ms. Isaeva had told him that Ms. Baulina had jumped from the window.

2.6 The Supreme Court confirmed the City Court's judgement on 28 June 1990, stating, with regard to counsel's argument that Ms. Isaeva and Mr. and Ms. Novitsky had given false testimonies, that this issue was examined by the court and that there was no support for it. With regard to counsel's argument that the court had not examined the forensic experts' conclusions, the Supreme Court stated that not only had the conclusions of the experts during the preliminary investigation been subjected to examination, there was also an expert testimony given at the trial.

Finally, the Supreme Court concluded that the criminal procedural law had not been violated. Attempts by counsel to have the case reopened through an appeal for a judicial review to the presiding Supreme Court judge, and to the General Procurator of the Russian Federation, have failed.

Complaint

3.1 The author claims that the courts violated his right to fair trial, in particular the presumption of innocence and his right to have witnesses called for the defence.

3.2 He claims that he was convicted on the basis of insufficient and contradictory evidence, since the conviction was based on his ex-mother-in-law's testimony at the trial, which contradicted her earlier statements and was inconsistent with the statements of other witnesses. Also in respect of the statements of the expert forensic examination, which was by no means unequivocal, the court insisted on considering them as such, and did not acknowledge those aspects of the expert conclusions that supported the author's version of the events. The author claims that the court was biased in contravention of article 14, paragraph 1, of the Covenant. This claim also appears to raise an issue under article 14, paragraph 2, of the Covenant.

3.3 The author claims that the court refused him the right to call and cross-examine witnesses and experts. In particular, the court denied the author the right to call police officers Golub, Gorynov, Semin and Aletiev who had questioned the author's ex-mother-in-law subsequent to the death of her daughter and who had conducted the pre-trial investigations. However, in the first hearing of January 1989, the court did hear the testimonies of police officers Golub and Gorynov. They stated that before she was taken to the hospital, Ms. Isaeva had said that the author had stabbed her and Ms. Baulina, but that she had not seen him throwing her daughter out of the window.

3.4 The author was also denied the right to call Dr. Sogrina, who had stated at the pre-trial investigation that he had witnessed Ms. Baulina sitting on the window sill with her back turned towards him, and that after a while, just before she fell, she turned and put her legs over the window sill. He also gave her first aid after she fell. Furthermore, the court denied the author the right to call his son Ilya, whose testimony could have cast light on the defendant's intentions, as well as other witnesses proposed by the defence. The court rejected the defence's request to call a forensic expert on his behalf, and to cross-examine the forensic experts that were already in place, in order to clarify contradictions in their findings, and counsel claims that this rejection was particularly disadvantageous to the author, since the court did not take into account the multiple possible versions of the events as set out by the experts, but relied on the version presented by the prosecution. Counsel claims that the courts' denial of the author's right to obtain the attendance of witnesses on his behalf and the cross-examination of forensic experts, amount to a violation of article 14, paragraph 3 (e) of the Covenant.

The State party's submission on the merits of the communication

4.1 By note verbale of 9 October 1997, the State party made its submission, contending that the author's allegations did not establish any violation of Covenant rights, since the preliminary and judicial proceedings were conducted in a completely objective manner and since the author had been sentenced according to law.

4.2 The State party contended that the author was convicted for the killing of his ex-wife on the basis of the testimony of his ex-mother-in-law and other witnesses, the opinions of commissions of experts in forensic medicine and forensic biology, the data contained in the records of an on-site inspection and a reconstruction of the crime, and other facts duly studied by the court. The author's alternative version of the occurrence of Ms. Baulin's death was duly considered by the court of the first instance and by the court of cassation, and found to be groundless.

Comments by the author

5. On 27 September 2001, the author submitted comments on the State party's submission. He points out that the State party's submission merely reiterates the domestic courts' decisions, but does not address the alleged violations of the Covenant, under article 14, paragraphs 1 and 3 (e).

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the trial against the author was initiated in 1988 and that the last court ruling was issued in June 1990, that is, prior to the entry into force of the Optional Protocol in respect of the State party on 1 January 1992. In the light of the fact that the author has not made any specific claims based on such continuing effects of alleged violations of the Covenant during his trial that would on their own constitute a violation of the Covenant, the Committee considers that it is precluded *ratione temporis* from considering the communication.

6.3 The Committee therefore decides:

(a) That the communication is inadmissible under article 1 of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

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[1] The Covenant entered into force for the State party on 23 March 1976, the Optional Protocol on 1 January 1992 (accession). Upon acceding to the Optional Protocol, the State party made the following declaration:

> "The Union of Soviet Socialist Republics, pursuant to article 1 of the Optional Protocol, recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Union of

Soviet Socialist Republics, in respect of situations or events occurring after the date on which the Protocol entered into force for the USSR. The Soviet Union also proceeds from the understanding that the Committee shall not consider any communications unless it has been ascertained that the same matter is not being examined under another procedure of international investigation or settlement and that the individual in question has exhausted all available domestic remedies."

[2] In the complaint to the Attorney-General, counsel refers to article 102 (D), but the courts refer to article 102 (g).

D. Communication No. 820/1998, *Rajan et al. v. New Zealand*[*] (Decision adopted on 6 August 2003, seventy-eighth session)

Submitted by: Mr. Keshva Rajan and Mrs. Sashi Kantra Rajan (represented by counsel, Mr. Sapt Shankar)

Alleged victims: The authors and their minor children, Vicky Rajan and Ashnita Rajan

State party: New Zealand

Date of communication: 11 June 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 6 August 2003,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Mr. Keshva Rajan, born in Fiji on 28 July 1965, Mrs. Sashi Kantra Rajan, born in Fiji on 6 June 1969, and their children Vicky Rajan, born in Australia on 2 February 1992, and Ashnita Rajan, born in New Zealand in March 1996, all residing in New Zealand at the time of the communication. They claim to be victims of violations by New Zealand of articles 9, paragraphs 1 and 4, 23, paragraph 1, and 24, paragraph 3, of the International Covenant on Civil and Political Rights. Without referring to specific articles, they also claim to be victims of discrimination and interference with their private lives and their children's rights to protection required by their status as minors. They are represented by counsel.

The facts as presented

2.1 Mr. Rajan emigrated to Australia in 1988, where he was granted a residence permit on 19 February 1990, on the basis of his de facto relationship with an Australian woman. Subsequently, in 1994, the woman was convicted in Australia of making a false statement in Mr. Rajan's application for residence. In 1990, Mr. Rajan married Sashi Kantra Rajan in Fiji, who followed him to Australia in 1991, where she obtained a residence permit on her husband's residency status. In 1991, Australian authorities became aware that the claimed de facto relationship was fraudulent and started taking action against Mr. and Mrs. Rajan, as well as against Mr. Rajan's brother (Bal) and sister who were believed to have obtained Australian residency under similarly false pretences. On 2 February 1992, son Vicky was born in Australia. On 22 April 1992, Mr. Rajan's brother (Bal) was arrested on ground of false immigration, and Mr. Rajan was advised of a pending interview by authorities.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.2 The following day, Mr. and Mrs. Rajan migrated to New Zealand. They did not disclose events transpiring in Australia, and were granted New Zealand residence permits on the basis of their Australian permits. On 24 April 1992, Mr. Rajan's brother (Bal) also left Australia for New Zealand. On 30 April 1992, the Australian authorities cancelled Mr. and Mrs. Rajan's Australian permits. On 5 June 1992, the New Zealand authorities were informed that Mr. and Mrs. Rajan were deemed to have absconded from Australia and were prohibited from re-entering Australia. On 3 July 1992, Mr. Rajan admitted to New Zealand authorities that his original de facto relationship in Australia was not genuine. Following investigations by the authorities, including interviews with Mr. and Mrs. Rajan, the Minister of Immigration, on 21 June 1994 revoked Mr. and Mrs. Rajan's residence permits on the basis that Mr. Rajan had failed to disclose that the Australian documentation (upon which the New Zealand permits were founded) was dishonestly obtained.

2.3 Mrs. Rajan, not having disclosed these facts in an application for citizenship to the Ministry of Internal Affairs, was granted citizenship on 26 October 1994, whereby, under s.8 of the Citizenship Act 1977, her Fijian citizenship was automatically annulled. In early 1995, her son Vicky was also granted New Zealand citizenship. On 19 April 1995, the Minister of Internal Affairs issued notice of intention to revoke citizenship on the grounds that it was procured by fraud, false representation, wilful concealment of relevant information or by mistake.

2.4 On 31 July 1995, the High Court dismissed an appeal against the revocation of residence permits and an application for judicial review of the Minister's decision to revoke, finding that they had been procured by fraud and false and misleading representation. The Court considered there was no threat to the family unit, as the child could live with the parents in Fiji and, if he so wished, return to New Zealand in his own right. The Court of Appeal dismissed their appeal. In March 1996, a second child, Ashnita, was born and automatically acquired New Zealand citizenship by birth.

2.5 On 17 July 1996, the Deportation Review Tribunal rejected Mr. and Mrs. Rajan's further appeal against the decision to revoke the residence permits, finding no reason to quash the decision. It observed that parents not otherwise entitled to remain in New Zealand could not be entitled to remain solely because they have children who are citizens. Mr. and Mrs. Rajan did not appeal the Tribunal's decision.

2.6 On 5 August 1996, the Minister of Internal Affairs issued a notice of intention to revoke Vicky Rajan's citizenship on the grounds that it was procured by fraud, false representation, wilful concealment of relevant information, or by mistake.
On 5 November 1996, the High Court rejected an application by Mrs. Rajan against the Minister's notice of intention to deprive her of citizenship, holding no error of law or administrative defect. The Court directed the Minister of Internal Affairs to consider the relevant provisions of international conventions before taking a final decision. On 28 January 1997, the Minister signed an order depriving Mrs. Rajan of citizenship on the formal basis of a grant in

error, in that the requisite period of time of residence had not been complied with. On 9 April 1997, the High Court dismissed an application for judicial review against the revocation decision. On 3 July 1998, the authors' communication was registered before the Committee.

2.7 On 15 April 1997, the Minister of Internal Affairs signed an order revoking Vicky Rajan's citizenship, leaving him with his Australian citizenship. The New Zealand authorities thereupon prepared removal warrants for service on Mr. and Mrs. Rajan, but their whereabouts could no longer be determined.

2.8 On 1 October 1999, the Immigration Act was substantially amended, including a provision that persons who were unlawfully in New Zealand following a confirmation of the Deportation Review Tribunal of the decision to revoke a residence permit could not further appeal to the Removal Review Authority. On 18 September 2000, the Government announced a "Transitional Policy". The policy permitted "well settled" overstayers, that is overstayers in New Zealand for five or more years with New Zealand-born dependent children, to be granted permits, subject to health and good character requirements. Mr. and Mrs. Rajan fell within the group requiring character waivers.

2.9 On 28 September 2000, the authors filed separate appeals with the Removal Review Authority. On 31 October 2000, the Minister of Immigration declined to intervene in the case. On 10 November 2000, the Authority declined jurisdiction to accept the appeals as a result of the Immigration Act amendments.

2.10 On 19 March 2001, the authors applied under the "Transitional Policy". A character waiver was sought on the basis of a conviction of Mr. Rajan in Australia for tax evasion. The application was silent as to the fraudulent obtaining of residence. On 23 April 2001, the Minister of Immigration rejected the request for a character waiver. As a result, on 15 October 2001, the application under the "Transitional Policy" was declined. On 23 May 2002, the Fijian authorities confirmed that both Mr. and Mrs. Rajan continued to be Fijian citizens with valid passports. In December 2002, following submission of further information, the Associate Minister of Immigration confirmed the Minister's decision, specifically considering the children's position.

2.11 On 8 April 2003, Mrs. Rajan's whereabouts were determined and she was served with a removal order. Mr. Rajan could not be located. She was informed that it was expected that they would both leave by 22 April 2003. On 2 May 2003, the High Court declined an application for judicial review of the Minister's decision not to grant a character waiver, confirming that there was "ample evidence" for the conclusion that fraud had been committed. The Court found the Minister had properly and fully taken the children's rights into account, and there had been no failure to be fair, just or equitable.

The complaint

3.1 The authors specifically allege violations of articles 23, paragraph 1, 24, paragraph 3, and 9, paragraphs 1 and 4. They do not relate these articles to particular claims and the claims themselves are difficult to identify. The claims outlined below also appear to raise issues under articles 13, 17, 24, paragraph 1, and 26 of the Covenant.

3.2 Since their children cannot live on their own and would have to leave New Zealand with their parents, it is claimed that their human rights will be violated by a forced removal from New Zealand of their parents. The deportation of Mr. and Mrs. Rajan to Fiji would constitute arbitrary interference with the family's private life and would possibly lead to divorce and insecurity of income.

3.3 It is stated that neither Mr. nor Mrs. Rajan were cross-examined by the appellate instances in New Zealand on the question of the alleged fraud, which Mr. Rajan always denied. With regard to Mrs. Rajan, it is contended that she was deprived of her Australian residence permit without being given the opportunity to be heard, even though she had done no wrong. As a result of the loss of her New Zealand citizenship, she is now stateless.

3.4 The authors claim that Vicky Rajan's rights were violated because his citizenship was revoked. According to the authors, this should not have occurred as he received it on the grounds of his own Australian citizenship and residency in New Zealand for three years, and not as the courts established, by virtue of his dependence on his mother. Therefore, it is argued, his citizenship cannot be revoked in connection with the withdrawal of his mother's citizenship.

3.5 It is intimated that the authors have been discriminated against with the suggestion that New Zealand law "applies more harshly against non-Europeans".

3.6 The authors refer to a decision of the New Zealand Court of Appeal[1] concerning a similar case, in which the authors contend it was ruled that international obligations, such as the Covenant on Civil and Political Rights and the Convention on the Rights of the Child, require New Zealand to accept its responsibility for children who are New Zealand citizens, and that children are not to be held responsible for the behaviour of their parents. It is alleged that the Minister of Internal Affairs, as a result of the judgement, had granted permits for parents in similar cases, including the cases of Mr. Rajan's sister and brother. That the decision was not followed in this case is said to constitute a case of discrimination against the authors.

The State party's submissions on admissibility and merits

4.1 By note verbale of 3 February 1999, the State party contested both the admissibility and merits of the communication. As to admissibility, it submits that the communication should be rejected for failure to exhaust domestic remedies, for failure to substantiate the claims and for incompatibility with the provisions of the Covenant.

4.2 With respect to the non-exhaustion of domestic remedies, the State party notes that Mr. and Mrs. Rajan are currently avoiding legal process, but are subject to a Removal Order being served on them when they are found. Such a removal order must be endorsed by a District Court judge before execution. Once a removal order is served on Mr. and Mrs. Rajan, they could appeal to the Removal Review Authority within 42 days of the date on which the removal order was served, arguing inter alia humanitarian and family circumstances. An appeal would then lie against the decision to the High Court and Court of Appeal on points of law. Alternatively, they could apply to the High Court, and in turn the Court of Appeal, for judicial review of the Removal Review Authority's decision. Finally, they could apply directly to the Minister of Immigration, especially if there is any new information, for a special direction for a residence permit.

4.3 In addition and particularly with respect to the alleged violations of articles 9 and 13, the State party contends that any such breaches of process would violate the New Zealand Bill of Rights Act 1990 and constitute grounds for review. Moreover, the State party points out that the authors did not appeal the decision against them of the Deportation Review Tribunal, as provided for by law, though the deadline for this has now lapsed.

4.4 The State party also submits that the authors have failed to substantiate their claims. They have not provided prima facie evidence of violations of provisions of the Covenant. Nor have they adduced evidence to establish any breach of process to suggest that the State party has acted arbitrarily or unlawfully or that the protection of the law was not available to them, or that it had not protected the family as envisaged under the Covenant. The family has the right to return to Fiji under Fijian law and would be provided with relevant travel documents by the New Zealand Government. There is no suggestion that the family will be separated. The children's independent rights to remain in New Zealand or Australia means that they may be sent for education or other forms of upbringing to other members of the extended family, in the same way as thousands of Pacific Islanders do. But this, the State party argues, would be the choice of the parents in relation to the welfare of their children and would not constitute grounds for a breach of the Covenant. In addition, the State party refers to the vague statements concerning possible harassment by the family members which might threaten the family and possibly lead to divorce in Fiji, and insecurity of income, buts notes that no evidence is provided to support such allegations. Neither is there any evidence that the family will not be able to re-tie its support networks in Fiji.

4.5 With regard to an alleged violation of article 26, the State party submits that the authors have failed to substantiate the vague allegations of racial discrimination. It is contended that any evidence of racial discrimination may still be raised by the authors in further proceedings prior to the removal of Mr. and Mrs. Rajan to Fiji. It also submits that the allegation of different treatment in relation to Mr. Rajan's sister and brother does not of itself constitute prima facie evidence of a breach of the obligation to ensure equal protection of the law under article 26 and no details have been provided.

4.6 As to Mrs. Rajan's claim of deprivation of citizenship so as to make her stateless, the State party contends that this claim does not involve a right protected by the Covenant and is thus inadmissible *ratione materiae* as incompatible with the Covenant. The State party observes that Mrs. Rajan has a right to return to Fiji under section 16 of the Fijian Constitution, and that she may in time reapply for her Fijian citizenship under section 12 (6) and (7) of the 1997 Fijian Constitution.

4.7 As to the merits, the State party refers in detail to the decisions of the domestic authorities. In considering the revocation of the Rajans' permits, the State party observes that the High Court was satisfied that Mr. Rajan had procured his residence permit by "fraud and by the false and misleading representation that he was living in a de facto relationship". Mrs. Rajan's derivative permit was, as a result, also fraudulently procured. The Court considered the possibility of a threat to the family unit and the protection of the children prior to dismissing the application. The Court of Appeal upheld this decision. The Deportation Review Tribunal considered the *Tavita* case, but held that having regard to the interests of the children did "not entitle the parents not otherwise able to remain in New Zealand to stay solely because they have children who are citizens". Having considered the family circumstances as a whole, the Tribunal found no grounds on which to quash the revocation of the residency permits.

4.8 The State party submits that Mr. and Mrs. Rajan are facing the consequences of Mr. Rajan's fraudulent actions to obtain residency in New Zealand. All the actions taken since were taken in accordance with the law, and have been tested several times by independent authorities and cannot therefore be characterized as arbitrary or unfair. It submits that the circumstances of the family, and particularly the welfare of the children, were considered at multiple levels in the process. The State party also refers to international jurisprudence in support of the Deportation Review Tribunal's decision that a child's citizenship, without more, cannot entitle parents to residence in that State.[2] What is required, according to the State party, is a balancing of the undoubted rights of the children and family as a whole, against all other factors.

4.9 The State party reiterates that there is no evidence provided to support any allegation of racial discrimination. On the allegation of unequal treatment as other persons in similar circumstances, in particular Mr. Rajan's sister and brother, appear to have been treated differently, the State party argues that such decisions are made on the circumstances of a particular case and the time and resources involved. Differentiation on this basis is reasonable and objective. It argues that it is the reality of decision-making in government that not all offenders will be prosecuted at once, where resources for prosecution are always less than the demand. It employs an analogy that merely because one person is caught speeding and prosecuted, whilst other people speed and are not prosecuted, does not mean that the former is discriminated against or denied equal protection of the law.

The author's comments on the State party's submissions

5.1 By letter of 30 June 1999, the authors contest that the communication is inadmissible and argue that the remedies referred to by the State party are stated in general terms. They contend that a challenge by judicial review and/or appeal to the High Court would have no prospect of success, adding that as they did not succeed in previous appeals they would be unlikely to succeed in subsequent applications for review. They argue that an application for judicial review may be made to challenge a point of "fact or law" only and that otherwise there is no prospect of reviewing the merits of their case. In this connection, they state that there are no grounds on which judicial review could be sought effectively and, therefore, such an application would be ineffective.

5.2 The authors also note that the remedies referred to by the State party are not available to them as they do not qualify for legal aid, and that they are not allowed now to work in New Zealand. Moreover, they claim that any representations made to the Removal Review Authority "fall into the class of remedy which we submit are properly classified as extraordinary remedies. They make a discretionary decision available but do not vindicate a right, hence they are or do not constitute effective remedies". To the authors, such remedies are akin to the right to make representations to an advisory panel against a deportation order which, they claim, the Committee has previously held could not be seen as an effective remedy.

5.3 The authors note that, with respect to the State party's claim that no prima facie case has been made by the authors in relation to alleged violations of articles 9 and 13, it is not explained how an action could be taken alleging a violation of the New Zealand Bill of Rights Act 1990. With respect to alleged racial discrimination, the authors reiterate that they are discriminated against as they are of Fijian Indian descent and "do not fit within the Anglo-Saxon preference". As to the State party's claim that the deprivation of citizenship of Mrs. Rajan, which makes her stateless, does not involve a right protected under the Covenant, the authors state that if these rights are not specifically protected under the Covenant "they are [so] in conjunction with the primary rights protected by the Covenant".

5.4 On the merits, the authors argue that their statements on the adverse effects of their removal to Fiji are sufficiently substantiated, and refer to the domestic proceedings at which these issues were raised. They provide information and a comparison on the treatment of another Fijian family who were granted New Zealand citizenship under the same procedures to support their submission that they have not been dealt with reasonably and objectively. They reiterate that such a difference in treatment, when the circumstances of the cases are similar, is discriminatory.

Supplementary submissions of the parties

6.1 On 15 February 2001, the authors of the communication requested the Committee to suspend examination of their communication, pending consideration of their application under the "Transitional Policy". By letters of 22 October 2001, 14 March 2002 and 23 December 2002, the authors described the sequence of subsequent events and argued, on the rejection of the request for a character waiver, that it was unfair to use Mr. Rajan's alleged fraud as a reason not to grant him a waiver, as he was neither charged nor found guilty of fraud and to implicate his wife in her husband's alleged wrongdoing was also unjust. They argue that, as their children are now 6 and 11 years old, it would be improper to suggest that they can stay in New Zealand without their parents. In addition, the authors claimed that having lodged recent appeals with the Removal Review Authority (which were rejected) and having made an application under the "Transitional Policy", they had exhausted domestic remedies.

6.2 By supplementary submissions of 14 May 2003, the State party observes that the authors had indicated an intention to appeal to the Court of Appeal against the High Court's decision of 2 May 2003. These issues have been litigated for 10 years, and seemingly will continue. Thus, in the interests of seeking finality, the State party explicitly foregoes any challenge in this case to the admissibility of the communication based on the need to exhaust domestic remedies. The State party observes that the extended period the whole matter has taken - more than 10 years - is due primarily to repeated unsuccessful legal challenges by Mr. and Mrs. Rajan. As the High Court observed, every consideration that might have been given to them has been. On the merits, the State party point out that the "Transitional Policy" is a sympathetic approach to the question of overstayer families, including their children. However the inability of the Rajans to come within it is a consequence of their past improper immigration conduct. The State party emphasizes this improper conduct is *not* just overstaying per se, but adopting positive acts to deceive both New Zealand and Australian immigration officials.

6.3 By letter of 5 June 2003, the authors advised that the Court of Appeal hearing had been set down for 23 June 2003. The State party had allegedly indicated that it would deport Mr. and Mrs. Rajan in the event of an adverse judgement of the Court of Appeal, though Mr. Rajan had not yet been located. Accordingly, given the imminent hearing of the case at the Committee's seventy-eighth session in July-August 2003, the authors sought the Committee's action pursuant to rule 86 of its rules of procedure to request the State party not to deport them until the Committee had made a determination in the case.

6.4 On 23 June 2003, the Committee, through its Special Rapporteur on new communications, pursuant to rule 86 of the Committee's rules of procedure, requested the State party not to remove any of the alleged victims from its jurisdiction, while the case was before the Committee.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 As to the exhaustion of domestic remedies, the Committee observes that the State party has explicitly waived any challenge to the admissibility of the communication on these grounds (see paragraph 6.2, supra)[8]

7.3 With respect to the authors' claim that the removal of Mr. and Mrs. Rajan would violate their rights under article 23, paragraph 1, and their children's right to protection under article 24, paragraph 1, the Committee notes that other than a statement that because of the children's youth they would also have to leave New Zealand if their parents were removed, the authors have provided insufficient argument on how their rights in this regard would be violated. It is clear from the decisions of the domestic authorities, that the protection of the family and, more particularly, the protection of the children were considered at each stage in the process including the High Court, the Court of Appeal, the Deportation Removal Tribunal and most recently by the Minister considering the author's application under the "Transitional Policy". The Committee observes that from an early point, and several years prior to the birth of Ashnita, the State party's authorities moved to remove the authors once fraudulent action became apparent, and that the subsequent time in New Zealand has, in large measure, been spent either in pursuing available remedies or in hiding. In addition, any contention that Mrs. Rajan, in the event that she was uninvolved in the fraud of Mr. Rajan, may have had a separate reliance interest arising from the passage of time is diminished by the State party moving with reasonable dispatch to enforce its immigration laws against criminal conduct. Consequently, the Committee is of the view that the authors have failed to substantiate their claim that they or their children are victims of violations of articles 17, 23 paragraph 1 and 24, paragraph 1, of the Covenant. These claims are, therefore, unsubstantiated and inadmissible under article 2 of the Optional Protocol.

7.4 The Committee notes the authors' contention that they and their children are victims of racial discrimination as they are not Anglo-Saxon and their contention that they have been treated differently and, therefore, unequally to others in similar cases, including the cases of Mr. Rajan's sister and brother. The Committee recalls that equality in enjoyment of rights and freedoms does not mean identical treatment in every instance and that differences in treatment do not constitute discrimination, when they are based on objective and reasonable criteria. The Committee observes that the national courts can only examine cases on the facts presented, and such facts differ from case to case. The authors have not presented the facts of any comparable cases either to the Committee or to the domestic courts; the Committee therefore considers that the arguments advanced by the authors do not substantiate, for the purposes of admissibility, the authors' claim that they are victims of discrimination or unequal treatment. Consequently, the Committee finds that this claim is inadmissible under article 2 of the Optional Protocol.

7.5 The Committee notes the claim that Vicky Rajan will be rendered stateless, as a result of the revocation of his New Zealand citizenship, thereby violating article 24, paragraph 3, of the Covenant. It appears, however, from the materials before the Committee, that Vicky Rajan still retains his Australian citizenship and, therefore, no issue under article 24, paragraph 3, of the Covenant arises. This claim in the communication is therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol. Taking into account that the Fijian authorities have confirmed that Mrs. Rajan's Fijian passport remains valid and that she continues to be a Fijian citizen, the same conclusion applies to any claim concerning revocation of Mrs. Rajan's New Zealand citizenship.

7.6 With regard to the alleged violations of article 9, paragraphs 1 and 4, and article 13, the Committee considers that these allegations have not been substantiated by the authors for the purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) This decision be communicated to the authors and to the State party.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] *Tavita v. Minister of Immigration* [1994] 2 NZLR 257.

[2] *Jaramillo v. United Kingdom* (ECHR Appl. 24865/94) and *Fajujonu v. Minister of Justice and Attorney-General* [1990] 2 IR 151 (High Court of Republic of Ireland).

[3] See also *Joslin et al. v. New Zealand*, Case No. 902/1999, Views adopted on 17 July 2002, at paragraph 7.3.

E. Communication No. 837/1998, *Kolanowski v. Poland**
(Decision adopted on 6 August 2003, seventy-eighth session)

Submitted by:	Janusz Kolanowski
Alleged victim:	The author
State party:	Poland
Date of communication:	22 November 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 6 August 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication is Janusz Kolanowski, a Polish citizen, born on 13 July 1949. He claims to be a victim of a violation by Poland[1] of articles 14, paragraph 1, and 26 of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

The facts as submitted

2.1 The author has been employed in the Polish police (formerly the Civic Militia) since 1973. In 1975, he completed the School for Non-commissioned Officers of the Police in Pila. He obtained a doctoral degree in "Sciences of Physical Culture" in 1991.

2.2 On 7 January 1991, the author requested the Chief Commander of the Police to appoint him to the rank of officer in the police. His request was denied on 22 February 1991, since he lacked the required "officer" training to be appointed to that rank. The author appealed this decision before the Minister of Internal Affairs, arguing that article 50, paragraph 1, of the Police Act (PA) only required professional training rather than officer's training for policemen with a higher education degree.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen and Ms. Ruth Wedgwood.

Pursuant to rule 85 of the Committee's rules of procedure, Mr. Roman Wieruszewski did not participate in the adoption of the Views.

2.3 On 24 April 1991, the author had a conversation with the Under-Secretary of State in the Ministry of Internal Affairs concerning his appointment to the higher rank. In a memorandum reflecting the conversation, the Under-Secretary of State expressed his approval for the author's appointment to the rank of an *aspirant*, a transitional rank between that of non-commissioned officers and the rank of officer. However, this approval was annulled by the Chief Commander of the Police on 20 August 1991, on the basis that the author's appointment to the "aspirant rank" by means of an exceptional procedure was unjustified.

2.4 By letter of 26 August 1991 to the General Commander of the Police in Warsaw, the author appealed the rejection of his appointment. On 28 August 1991, he sent a similar complaint to the Under-Secretary of State in the Ministry of Internal Affairs. In his response, dated 16 September 1991, the General Commander of the Police once again informed the author that he did not have the required officer's training. On 29 June 1994, the Minister of Internal Affairs refused to institute proceedings with respect to the rejection of the author's appointment to the aspirant rank, which was not considered an administrative decision within the meaning of article 104 of the Code of Administrative Procedure (CAP).

2.5 On 25 August 1994, the Ministry of Internal Affairs rejected another motion of the author for appointment to the aspirant rank dated 19 July 1994. After the author had unsuccessfully filed an objection to this decision with the Ministry of Internal Affairs, he lodged a complaint with the High Administrative Court in Warsaw on 6 December 1994, challenging the non-delivery of an administrative decision on his appointment. On 27 January 1995, the Court dismissed the complaint, as the refusal to appoint the author to the higher rank was not an administrative decision.

2.6 By letter of 1 March 1995 addressed to the High Administrative Court, the author complained that the Court had failed to give the reasons and the legal provisions on which its decision to dismiss his complaint was based. This motion was rejected by the Court on 14 March 1995. The author subsequently sent a letter to the Minister of Justice, accusing the judges who had decided on his complaint of "perversion of justice". On 30 March 1995, the President of the High Administrative Court, to whom the letter had been forwarded by the Ministry of Justice, informed the author that, while no grounds existed for reopening his case, he was free to lodge an extraordinary appeal against the Court's decision of 27 January 1995.

2.7 On 11 July 1995, the author requested the Polish Ombudsman to lodge an extraordinary appeal with the Supreme Court, with a view to quashing the decision of the High Administrative Court. By letter of 28 August 1995, the Ombudsman's Office informed the author that its competence to lodge an extraordinary appeal was limited to alleged violations of citizens' rights and was subsidiary in that it required a prior unsuccessful request to an organ with primary competence to lodge an extraordinary appeal with the Supreme Court. The Ombudsman denied the author's request, since it failed to meet these requirements.

2.8 The author then asked the Ombudsman to forward his request to the Minister of Justice. On 13 November 1995, he sent a copy of the request to lodge an extraordinary appeal with the Supreme Court to the Minister of Justice, in the absence of any reaction from the Ombudsman. At the same time, he requested reinstatement to the previous condition, arguing that the expiry of the six-month deadline to appeal the Court's decision of 27 January 1995 could not be attributed to any failure on his part. On 20 February 1996, the Ministry of Justice denied the request to lodge an extraordinary appeal, since the six-month deadline had already expired at the time of the submission of the request (16 November 1995) and because there was no basis for the Minister to act, as the case raised no issues affecting the interests of the Republic of Poland.

2.9 On 4 March 1996, the author asked the Ombudsman to reconsider his request to submit an extraordinary request to the Supreme Court, arguing that the delay in handling his first request of 11 July 1995 had caused the expiry of the six-month deadline. In subsequent letters, he reiterated doubts over the legality of the examination of his complaint by the High Administrative Court. In his reply, dated 2 September 1996, the Ombudsman rejected the request. He warned the author that his accusations against the judges of the High Administrative Court might be interpreted as constituting a criminal offence.

2.10 In parallel proceedings, the author had been dismissed from police service in 1992, but was reinstated following a decision of the High Administrative Court of 18 August 1993, declaring the dismissal null and void. In 1995, he was dismissed a second time from police service. By decision of 8 May 1996, the High Administrative Court upheld the dismissal, apparently because the author had failed to comply with service discipline. Appeal proceedings against this decision were still pending at the time of the submission of the communication.

The complaint

3.1 The author claims to be a victim of violations of articles 14, paragraph 1, and 26 of the Covenant, as he was denied access to the courts, on the basis that the refusal to appoint him to the rank of an aspirant was not regarded as an administrative decision and therefore not subject to review by the High Administrative Court.

3.2 He argues that his complaint against the refusal of appointment and the non-delivery of an administrative decision involves a determination of his rights and obligations in a suit at law, since article 14, paragraph 1, must be interpreted broadly in that regard. Moreover, he claims that the bias shown by the judges of the High Administrative Court and the fact that he was deprived of the possibility to lodge an extraordinary appeal with the Supreme Court, either through the Minister of Justice or the Ombudsman, since the Ombudsman's Office had failed to process his request in a timely manner, constitute further violations of article 14, paragraph 1.

3.3 The author contends that the delivery of administrative decisions is required in similar situations, such as in cases of deprivation or lowering of military ranks of professional soldiers or when an academic degree is granted by the faculty council of a university. Since soldiers and academic candidates can appeal such decisions before the courts, the fact that such a remedy was not available to him is said to constitute a violation of article 26.

3.4 The author claims that he has exhausted domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement.

The State party's submission on the admissibility and merits of the communication

4.1 By note verbale of 22 June 1999, the State party submitted its observations on the communication, challenging both admissibility and merits. While not contesting exhaustion of domestic remedies, it submits that the communication should be declared inadmissible *ratione temporis*, insofar as it relates to events which took place before the entry into force of the Optional Protocol for the State party on 7 February 1992.

4.2 Moreover, the State party considers the author's claim under article 26 of the Covenant inadmissible for lack of substantiation. In particular, any comparison between the deprivation and lowering of military ranks of professional soldiers, which is made in form of an administrative decision, under section 1 of the Ordinance of the Minister of Defence of 27 July 1992, and (internal) decisions taken under the provisions of the Police Act is inadmissible, given the limited application of section 1 of the Ordinance to exceptional cases only. Similarly, no parallel can be drawn to the granting of an academic degree by administrative decision, a matter which is different from the refusal to appoint someone to a higher service rank.

4.3 The State party submits that the delivery of administrative decisions is subject to the existence of legislative provisions which require the administrative organ to issue such a decision. For example, the delivery of an administrative decision is explicitly required for the establishment, alteration or termination of labour relationships in the Bureau of State Protection (UOP).[2] However, this rule only applies to appointments and not the refusal to appoint UOP officers to higher service ranks. A landmark judgement of 7 January 1992 of the Constitutional Court holds that the provisions of the Border Guard Act of 12 October 1990, which exclude the right to trial in cases about service relationships of Border Guard officers, are incompatible with articles 14 and 26 of the Covenant. The State party argues that this ruling is irrelevant to the author's case, since the contested provisions of the Border Guard Act concerned external service relationships, which are subject to special legislation requiring the delivery of an administrative decision.

4.4 With regard to the alleged violation of article 14, paragraph 1, of the Covenant, the State party submits that every national legal order distinguishes between acts which remain within the internal competence of administrative organs and acts which extend beyond this sphere. The refusal to appoint the author to the rank of an "aspirant" is of purely internal administrative character, reflecting his subordination to his superiors. As internal acts, decisions concerning appointment to or refusal to appoint someone to a higher service rank cannot be appealed before the courts, but only before the superior organs to which the decision-making organ is accountable.

4.5 The State party emphasizes that article 14, paragraph 1, guarantees the right of everyone to a fair trial in the determination of his or her rights and obligations in a suit at law. Since this provision essentially relates to the determination of *civil* rights and obligations, the present case falls outside the scope of article 14, paragraph 1, being of purely administrative character. Moreover, the State party argues that the author's complaint against the refusal to appoint him to a higher service rank bears no relation to the determination of a *right*, in the absence of an entitlement of policemen or other members of the uniformed services to request such appointment as of *right*.

Comments by the author

5.1 By letter of 15 November 1999, the author responded to the State party's observations. He contends that the relevant events took place after the entry into force of the Optional Protocol for Poland on 7 February 1992, without substantiating his contention.

5.2 The author insists that the refusal to appoint him to the rank of an aspirant constituted an administrative decision, citing several provisions of administrative law he considers pertinent. He argues that there is no basis in Polish law which would empower State organs to issue internal decisions. By reference to article 14, paragraph 2, of the Police Act, the author submits that it follows from the subordination of the Chief Commander of the Police to the Minister of Internal Affairs that the Chief Commander was obliged to follow the "order" of the Under-Secretary of State in the Ministry of Internal Affairs to appoint him to the higher service rank. The refusal to appoint him to that rank was also illegal in substance, since he fulfilled all legal requirements for such appointment.

5.3 With regard to the State party's argument that his claim under article 26 is unsubstantiated, the author submits that, even though the special provisions concerning the deprivation and lowering of military ranks of professional soldiers and the granting of academic degrees, which are made by administrative decision, are not applicable to his case, the legislation precluding policemen from appealing decisions on their appointment or non-appointment to a higher service rank is in itself discriminatory.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being and has not been examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol, and that the author has exhausted domestic remedies, in accordance with article 5, paragraph 2 (b) of the Optional Protocol.

6.3 The Committee takes note of the State party's argument that the communication is inadmissible insofar as it relates to events which took place before the entry into force of the Optional Protocol for Poland on 7 February 1992. Under its established jurisprudence, the Committee cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless the violations complained of continue after the entry into force of the Optional Protocol. The Committee notes that the author first requested to be promoted in 1991, i.e. prior to the entry into force of the Optional Protocol in respect of the State party. Although the author continued after the entry into force of the Optional Protocol with proceedings to contest a negative decision to his request, the Committee considers that these proceedings in themselves do not constitute any potential violation of the Covenant. However, the Committee notes that subsequent to the entry into force of the Optional Protocol in respect of the State party the author initiated a second set of proceedings aiming at his promotion (see paragraph 2.5) and that any claims related to these proceedings are not inadmissible *ratione temporis*.

6.4 As to the author's claims under article 14, paragraph 1, the Committee notes that they relate to the author's efforts to contest a negative decision on his request to be promoted to a higher rank. The author was neither dismissed nor did he apply for any specific vacant post of a higher rank. In these circumstances the Committee considers that the author's case must be distinguished from the case of *Casanovas v. France* (Communication 441/1990). Reiterating its view that the concept of "suit at law" under article 14, paragraph 1, is based on the nature of the right in question rather than on the status of one of the parties, the Committee considers that the procedures initiated by the author to contest a negative decision on his own request to be promoted within the Polish police did not constitute the determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, of the Covenant. Consequently, this part of the communication is incompatible with that provision and inadmissible under article 3 of the Optional Protocol.

6.5 In relation to the alleged violations of article 26, the Committee considers that the author has failed to substantiate, for purposes of admissibility, any claim of a potential violation of article 26. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the author, and, for information, to the State party.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 18 June 1977 and 7 February 1992.

[2] See section 33 of the Ordinance of the Prime Minister of 10 January 1998 concerning the service of officers of the UOP.

F. Communication No. 872/1999, *Kurowski v. Poland*[*]
(Decision adopted on 18 March 2003, seventy-seventh session)

Submitted by:	Mr. Eugeniusz Kurowski (represented by counsel, Mr. Adam Wiklik)
Alleged victim:	The author
State party:	Poland
Date of communication:	30 September 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 March 2003,

Adopts the following decision:

Decision on admissibility

1.1 Communication submitted by Mr. Eugeniusz Kurowski, a Pole, born in 1949. He claims to be a victim of violations by Poland of article 14, paragraph 1, and of article 25 (c), in combination with article 2, paragraph 1, of the International Covenant on Civil and Political Rights. He is represented by counsel.

1.2 The International Covenant on Civil and Political Rights entered into force for Poland on 18 June 1977, and the Optional Protocol on 7 February 1992.

Facts as submitted by the author

2.1 From December 1976 until 1989, the author held a post in the Polish law enforcement services (National Militia). In 1989, he was appointed deputy security chief of the Regional Office of Internal Affairs in the town of Andrychów. On 31 July, he was dismissed pursuant to the State Protection Office Act of 6 April 1990, which had dissolved the Secret Police by transforming it into a new department.

2.2 In its Ordinance No. 69 of 21 May 1990, the Council of Ministers established qualification proceedings and criteria for the reinstatement in the new department of officers who had been dismissed. Reinstatement could take place only after a regional qualifying commission issued a positive assessment or through an appeal to the Central Qualifying Commission in Warsaw. On 22 July 1990, the Bielsko-Biala Qualifying Commission declared that the author did not meet the requirements for officers or employees of the Ministry of Internal Affairs. The Central Qualifying Commission confirmed that opinion on 5 September 1990, following an appeal made by the author on 28 July 1990.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Maxwell Yalden.

2.3 On 25 April 1995,[1] the author requested the Minister of Internal Affairs to overturn the decisions of the qualifying commissions and to reinstate him in the Police. On 29 May 1995, the Minister replied that he had no authority to alter decisions by the qualifying commissions or to recruit anyone who did not receive a positive assessment from them. On 1 February 1996, the Minister confirmed that reply. The author lodged an appeal with the Central Administrative Court. However, the Court nonsuited him, considering that it was not competent to give a ruling on decisions taken by the qualifying commissions.

The complaint

3.1 The author claims that he is a victim of a violation by the State party of article 25 (c) of the Covenant, since the Ministry of Internal Affairs dismissed him from the Police[2] because he was a member of the Polish United Workers' Party and held leftist political views. Moreover, the Ministry of Internal Affairs had unjustly classified him as a member of the Security Service although, at the time of his admission to the Police, he had been a police officer and had worn the uniform for the duration of his service. The author considers that this violation should be considered together with a violation of article 2, paragraph 1, of the Covenant.

3.2 The author also claims to be a victim of the State party's violation of his right to access to a court, since neither the question of his dismissal nor his retroactive reclassification as an agent of the Security Service could be reviewed by a court.

3.3 He considers that the decisions of the qualifying commissions had been handed down by members hostile to the left and who dismissed any candidate holding political views different from theirs. Since the decisions that had been handed down in that manner were not subject to appeal before a court or other body independent of the Ministry of Internal Affairs, the author considers himself a victim of the State party's violation of his right to a hearing by an independent and impartial tribunal.

The State party's observations on admissibility and the merits

4.1 The State party transmitted its observations on 31 May 2000. After briefly summarizing the facts of the case, the State party refers to the relevant national legislation. It states that, following the political transformation in 1989, it was necessary to adopt completely new provisions concerning security and public order. The Parliament took a decision to reorganize the units subordinate to the Ministry of Internal Affairs, particularly its political service. This resulted in the dissolution of the Secret Police, the dismissal of officers and the establishment of the State Protection Office. In view of the role formerly played by the Secret Police,[3] the State party considers these changes indispensable. The ideological nature of the Secret Police was another reason for the decision to disband it.[4] However, the principal objective of replacing the Security Police by the State Protection Office was to create more effective guarantees for the rule of law and respect for human rights. Criteria have been adopted for that purpose. Conformity with those criteria entitled former officers of the Security Police to be reinstated in public service. The legal basis for the aforementioned reorganization of the Ministry of Internal Affairs is to be found in two acts, adopted on 6 April 1990 (on the Police and on the State Protection Office), as well as Council of Ministers Ordinance No. 69 of 21 May 1990. Article 129 of the State Protection Office Act provides for the dissolution of the Security Police beginning from the date of the establishment of the State Protection Office. Under article 131, paragraph 1, of that Act, the officers of the Security Police were dismissed *ex lege*. This provision also applied to officers of the Militia, who until 31 July 1989 were officers of the Security Police, according to paragraph 2 of the aforementioned article.

4.2 Article 132, paragraph 2, of the State Protection Office Act provides that the Committee of Ministers is authorized to establish the procedural modalities and criteria for the reinstatement of officers of the Security Police in the new departments. On 21 May 1990, the Committee of Ministers adopted Ordinance No. 69, which provided for the possibility of reinstatement only for those officers of the Security Police who obtained a positive assessment from a qualifying commission as part of special qualification proceedings. The qualification proceedings were begun on the initiative of the person concerned. Regional qualifying commissions were authorized to give a first instance opinion. Subsequently, within seven days, the person concerned could lodge an appeal against a negative assessment with the Central Qualifying Commission. The decision of the Central Qualifying Commission was final. The State party maintains that the commissions had the obligation of determining whether or not candidates met the criteria established for officers of a given service of the Ministry of Internal Affairs and whether or not they met the requisite moral qualifications.

4.3 The State party continues, indicating that the new State Protection Office had been established in the context of a democratic society and that that had been the reason for the substantial reduction of posts in the State Protection Office. The law did not oblige that new body to recruit all candidates who had received a positive assessment in the qualification proceedings; moreover, that is made clear in paragraph 10 of Ordinance No. 69, which specifies that a positive assessment was merely a condition that allowed candidates to apply for posts in the Ministry of Internal Affairs but did not guarantee placement.

4.4 On 22 January 1990, the Minister of Internal Affairs promulgated Order No. 8/90,[5] containing a list of Security Police posts and indicating, inter alia, the posts allocated to the Research and Analysis Section of the Regional Office of Internal Affairs. For the purposes of qualification, the Minister promulgated Order No. 53/90 on 3 July 1990 in order to confirm and reiterate the categories of posts recognized as having been part of the Security Police. According to that order, officers employed until 10 May 1990 in posts allocated, inter alia, to the Research and Analysis Section of the Regional Office of Internal Affairs were classified as officers of the Security Police.

4.5 With regard to the admissibility of the communication, the State party recalls that the Covenant entered into force for Poland on 18 June 1977 and the Optional Protocol on 7 February 1992. The State party considers that the Committee can admit only individual communications concerning allegations of human rights violations that took place after the Optional Protocol entered into force, that is, after 7 February 1992. The qualification proceedings with respect to the author were completed on 5 September 1990.[6] All subsequent letters from the complainant sent to various institutions and concerning his reinstatement in the Police were more on the order of routine correspondence and did not constitute administrative decisions or acts of public administration. Thus, as confirmed, inter alia, in the decision of the

Supreme Administrative Court on 7 May 1996, rejecting his complaint concerning the letter refusing to reinstate him in the police force, such correspondence should not be considered an integral part of the proceedings in the author's case. According to the State party, such correspondence also did not constitute an effective legal recourse.

4.6 The State party also considers that, in the case under consideration, there is no reason to invoke the principle of the retroactive application of the Optional Protocol, as elaborated by the Committee, in exceptional circumstances. According to the State party, the alleged violations are not of a continuous nature and their effects are not persistent. It refers to the Committee's jurisprudence (communications 520/1992 and 568/1993), according to which a continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State party. According to the State party, the proceedings relating to the author's case ended on 5 September 1990, that is, before 7 February 1992. For these reasons, the State party contends, the communication should be declared inadmissible *ratione temporis* with respect to the Optional Protocol to the International Covenant on Civil and Political Rights.

4.7 With regard to the exhaustion of domestic remedies, the State party notes that the author exhausted all remedies available under Polish law, by lodging an appeal with the Central Qualifying Commission in Warsaw against the decision of the Bielsko-Biala Regional Qualifying Commission.

4.8 With regard to the merits of the case, the State party considers that the fact that the author had served in the Secret Police is incontrovertible; he had also been a member of the Polish United Workers' Party. Order No. 8/90 had been promulgated on 22 January 1990 as special legislation relating to the 1985 Act on the Security Police and the Civic Militia, which had been in force before the adoption of the new acts of 6 April 1990. The State party affirms its steadfast conviction that, contrary to the author's allegations, the case under consideration has no bearing on the retroactive classification. The author himself does not deny the fact that he served in the Security Police, as is clear from his letter of 5 April 1995 to the Minister of the Interior. The fact that the author was dismissed as an officer of the Security Police, pursuant to article 131 of the State Protection Office Act, did not constitute a sanction against him. The aim of Parliament's decision, which was legal and legitimate, was to dissolve the infamous Security Police and to dismiss all its officers *ex lege*.

4.9 The State party asserts that a legal, financial and organizational distinction between the Civic Militia and the Security Police existed both before and after 1990. The two units were part of the Ministry of Internal Affairs. Within internal affairs at the regional and district levels, there were special sections of the Security Police headed by an officer holding the post of deputy chief of the Local Office of Internal Affairs. The author had been in the Security Police since February 1989.

4.10 The State party states that it interprets article 25 (c) of the Covenant in the spirit of the *travaux préparatoires* of the Covenant and shares the opinion that the provisions of that article are aimed at preventing privileged groups from monopolizing the State apparatus. In any case, according to the State party, the drafters of the Covenant were unanimous in their recognition of the fact that a State party must have the possibility of establishing certain criteria concerning the access of its citizens to public service positions. Ethical criteria, inter alia, were the basis for the dissolution of the Security Police and the adoption of the State Protection Office Act, which entailed the decision to dismiss all security officers.

4.11 The State party cites general comment No. 25, adopted by the Human Rights Committee on 12 July 1996, and draws attention to paragraph 23, which states that "to ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable". The State party considers that the criteria applied in the present case met those conditions. Moreover, the State party notes that, in a similar case, the Committee did not find a violation of article 25 (c) of the Covenant (communication No. 552/1993, *Kall v. Poland*).

4.12 The State party also emphasizes that the qualification proceedings undertaken by the author were of a voluntary and non-obligatory nature. Council of Ministers Ordinance No. 69 of 21 May 1990 made that quite clear in its paragraph 6.1. According to the statistics of the Ministry of Internal Affairs, out of a total of 18,000 dismissed officers, 14,034 went through the qualification process and 3,595 received a negative assessment. According to the State party, that clearly demonstrated that not all officers had opted for qualification and, in the case of those who did, 25 per cent had received negative assessments. In spite of the fact that virtually all the officers of the Security Police were members of the communist party, the qualification proceedings had not led to "vengeance" on political grounds. All officers with negative assessments from the qualifying commissions had lost their social credibility and could no longer serve in internal affairs.

4.13 The State party maintains that, in the present case, there has been no violation of article 25 (c) of the Covenant and requests that the Human Rights Committee find the communication inadmissible *ratione temporis*. In addition, the communication should be considered as unfounded.

The author's comments on the State party's observations

5.1 The author submitted his comments on 5 October 2000. He states that he maintains his previous positions and that, contrary to the State party's arguments, article 25 (c) of the Covenant has indeed been violated in his case. The decision to dismiss him from the police force had been motivated by political considerations, without any other reason. The author explains that, if there had been other reasons, they would certainly have been contained in the Qualifying Commission's decision. The author believes that he had both the professional and moral qualifications to continue to work in the Police. The proof was his personal file in the Ministry of Internal Affairs, as well as the written opinion about the author by his superior (in the text, his "employer").

5.2 According to the author, the position that he expounded to the Committee was based on both well-founded and formal considerations, since the failure of a State administrative body to assemble all the evidence constituted a breach of the provisions on administrative procedure, particularly when one of the parties invokes special circumstances. To decide in an administrative case by taking a decision based on falsely established facts is contrary to the principle of objective truth, which is binding with respect to the provisions on administrative procedure and violates, inter alia, articles 7, 75, 79 and 81 of the Code of Administrative Procedure.[7] The violation of the provisions on administrative procedure influenced the establishment of the facts in the case under consideration, and errors, as in the present case, led to a decision different from that which would have been taken had the facts been established in an appropriate manner. According to the author, the establishment of the facts, as well as the violation of provisions when the decision was taken to dismiss him from the Police, should have been subject to judicial review, in accordance with article 6, paragraph 1, of the European Convention on Human Rights and Fundamental Freedoms. However, the Supreme Administrative Court did not examine the author's claim contesting the refusal to offer him the possibility of resuming employment in the Police in spite of the fact that, in a similar decision relating to article 14 of the Covenant, the Constitutional Court had ruled that "everyone has the right to a fair and public hearing by a competent, independent and impartial tribunal". The position of the Supreme Administrative Court is, according to the author, contrary to the ruling of the Court of Justice of the European Communities of Luxembourg.[8] The author requests that this fact be taken into account when the communication is considered.

5.3 The author also maintains that, contrary to article 10, paragraph 1, and article 79, paragraph 2, of the Code of Administrative Procedure, he had been deprived of his right to participate in the administrative proceedings, in spite of the fact that the provisions guaranteed each of the parties the right to participate in every stage of the proceedings before a State administrative body. He also states that article 8 of the Code of Administrative Procedure provides that real circumstances can be recognized as proved if the parties have had an opportunity to express their opinion concerning the oral evidence before a decision is taken. The real circumstances, established in the proceedings relating to the present case, in which Mr. Kurowski did not take part and was unable to express his opinion concerning the oral evidence before the Qualifying Commission prior to his dismissal from the Police, cannot be considered proved under Polish law. State administrative bodies are obliged to respect the provisions of articles 79 and 81 of the Code of Administrative Procedure, regardless of the weight and content of the oral evidence.[9] Under Polish law, the orders (instructions) of the Ministry of Internal Affairs on the dismissal of officers of the communist Security Service and the communist Militia, as explained by the State party, cannot be recognized as legal acts providing the legal basis for including Mr. Kurowski in the communist Security Service. Moreover, the mere fact of including a police officer in the communist Security Service should not result in his dismissal from the Police if it has not been proved that he acted to the detriment of citizens or the State, and if he had the requisite professional qualifications and fulfilled the ethical and moral conditions.

5.4 The author also challenges the State party's observations on the objectives and tasks of the State Protection Office, since that institution has long, and increasingly, been considered as being political, as demonstrated by its actions against the President of the Republic, as well as the comments made by the Minister of State Protection to the opposition and the President of the Republic, and the surveillance of the opposition. Consequently, the author contends that the main objective of replacing the Security Police by the State Protection Office - "to create more effective guarantees of the rule of law and respect for human rights" - is highly debatable. The objective of the replacement was to remove members of the Police whose political views were different from theirs. The regional qualifying commissions and the Central Qualifying Commission were composed of opponents of the Polish left, who handed down politically motivated decisions and who dismissed from the Police all those who held political views different from theirs. The assessments, terse and unsubstantiated, were an example of nepotism. The assessments could not be reviewed by a court or other administrative body independent of the Ministry of Internal Affairs. The assessments given by the commissions were tantamount to dismissal from public service and, consequently, had nothing in common with the law or the democratic order; on the contrary, they were an example of the post-1989 leaders' authoritarian style of government.

5.5 The author also asserts that the State party had been wrong in alleging that his dismissal from the Police had been due to a reduction of posts in the State Protection Office and the Police. The author claims that the number of police officers had in fact increased. Consequently, the State party's explanations do not merit consideration.

5.6 Finally, the author considers that the Human Rights Committee is in a position to examine his communication, since Poland had ratified the International Covenant on Civil and Political Rights on 3 March 1977, especially if account is taken of the fact that, in 1995, the author brought actions against the decision to dismiss him. In the light of the foregoing, as well as of the violation of articles 39 and 40 of the Labour Code by the Ministry of Internal Affairs - since the author had been dismissed from the Police on 31 July 1990 in spite of the fact that he had been ill between February 1990 and 26 August 1990 as the result of a work-related accident and that he had only one year remaining before his retirement - the communication to the Human Rights Committee should be considered admissible.

Issues and proceedings before the Committee

Admissibility considerations

6.1 Before considering any communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the matter is not being examined under another international procedure and that the domestic remedies have been exhausted. The conditions set out in article 5, paragraph 2, of the Optional Protocol have therefore been met.

6.3 The Committee notes that the State party claims that the communication is inadmissible *ratione temporis*, since the qualification proceedings for the author ended on 5 September 1990, that is, before the Optional Protocol entered into force for Poland on 7 February 1992. The author challenges that argument and replies that the State was party to the Covenant since June 1977, that the Optional Protocol entered into force in 1992 and that he did not take legal action against his dismissal until 1995 (after the Optional Protocol had come into force).

6.4 The Committee recalls that the obligations that the State party assumed when it signed the Covenant took effect on the date on which the Covenant entered into force for the State party. Following its jurisprudence, the Committee considers that it cannot consider violations that took place before the Optional Protocol entered into force for the State party, unless such violations persisted after the entry into force of the Optional Protocol. A persistent violation is understood to mean the continuation of violations which the State party committed previously, either through actions or implicitly.

6.5 In the present case, the author was dismissed from his post in 1990, under the law in force at the time, and the same year he presented himself as a candidate, without success, before one of the regional qualifying commissions in order to determine whether he satisfied the new statutory criteria for employment in the restructured Ministry of Internal Affairs. The fact that he did not win his case during the proceedings which he initiated in 1995, after the Optional Protocol came into force, does not in itself constitute a potential violation of the Covenant. The Committee is unable to conclude that a violation occurred prior to the entry into force of the Optional Protocol for the State party and continued thereafter. Consequently, the Committee declares the communication inadmissible *ratione temporis*, in accordance with article 1 of the Optional Protocol.

7.1 Accordingly, the Human Rights Committee decides:

(a) That the communication is inadmissible under article 1 of the Optional Protocol to the Covenant;

(b) That this decision shall be communicated to the State party and to the authors of the communication.

Notes

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[1] The author justifies the delay between his dismissal in 1990 and the date on which he made his appeal by stating that, between 1991 and 1995, he was in poor health and had neither the strength nor the opportunity to fight for his rights, but that he did so as soon as he recovered his health. The author attaches two pieces of documentary evidence: the conclusion of a board of inquiry attesting that, on 13 June 1990, he had suffered lower back pain while performing his duties, following which he received sick leave from 10 to 27 September 1988. The consequences for the author had been difficulty in moving part of his lower back and reduced feeling in his legs. The other piece of evidence is an extract from the author's health record, referring to medical follow-up in 1990 of the after-effects of his accident.

[2] The author insisted in his request that he had lost his job for political reasons. He describes his career in the Police and explains that he had been offered a promotion to the post of deputy security chief in Andrychów in 1989 because of his good work. He indicates that, at the time, the refusal of such an offer was tantamount to blocking any future advancement of the person concerned and even could prevent him from continuing to work in his former post. The author also stated that, as deputy security chief, neither he nor any of his subordinates had engaged in reprisals against the opposition. He also explained that he considered that he had been deprived of his right to defend himself, since the decision of the Regional Qualifying Commission did not give any reason for his dismissal but indicated only that he did not meet the necessary requirements.

[3] The State notes in this regard that, until 1989, the role of the Secret Police was to keep citizens under surveillance and, in particular, to persecute pro-democratic activists, through the use of unlawful methods and means.

[4] The State party cites article 1 of the Act of July 1985 on the service of officers of the Security Police and the Civic Militia of the People's Republic of Poland, according to which members of the Security Police must distinguish themselves by (...) fulfilling the programme of the Polish United Workers' Party.

[5] Order No. 8/90 amended Order No. 60/87 on the service of officers of the Security Police and the Civic Militia. The adoption of these orders are duly authorized, in accordance with the Act of 31 July 1985 on the service of officers of the Security Police and Civic Militia of the People's Republic of Poland.

[6] With the Central Qualifying Commission's decision on the appeal. The State insists that the decision was final and not subject to appeal.

[7] The author did not furnish the text of the aforementioned articles.

[8] The author uses the term "European Court of Justice of Luxembourg". With regard to the relationship between Community law and national law, the Court of Justice of the European Communities affirmed the primacy of Community law over national law in its judgement of 15 July 1964, Costa, 6/64, *Recueil* [Collection], p. 1141. In that judgement, which it subsequently confirmed on a number of occasions in its jurisprudence, the Court ruled "... the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question".

[9] In this regard, the author cites a judgement of 13 February 1998 of the Supreme Administrative Court, ref. No. II SA 2015/86 ONSA No. 1, item 13, but does not furnish a copy of the decision.

G. Communication No. 876/1999, *Yama and Khalid v. Slovakia*[*]
(Decision adopted on 31 October 2002, seventy-sixth session)

Submitted by:	Mr. L. Yama and Mr. N. Khalid (represented by counsel Mr. Bohumir Bláha)
Alleged victim:	The author
State party:	Slovakia
Date of communication:	2 August 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2002,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Latiphy Yama and Neda Khalid, both nationals of Afghanistan, at the time of submission residing at the Refugee Humanitarian Centre in the Slovak Republic. They claim to be victims of violations by the Slovak Republic[1] of articles 2, 14, and 26 of the International Covenant on Civil and Political Rights. They are represented by counsel.

The facts as submitted by the authors

2.1 On 10 March 1997, both Latiphy Yama and Neda Khalid arrived in the Slovak Republic and immediately applied for asylum at the migration office of the Ministry of the Interior. Mr. Yama explained in his application that he had fled Afghanistan after the occupation of Kabul by the Taliban rebel group, as he was a member of the People's Democratic Party of Afghanistan, which had had confrontations with the Taliban, and he was in fear of his life. Mr. Khalid explained that he had fled the occupation of Kabul, as his father was a General in the army during the regime of Dr. Najibullah and his eldest brother who was one of the high ranking officers in the same army was killed on the streets of Kabul during the occupation.

2.2 Mr. Khalid and Mr. Yama's applications were rejected by decisions of the migration office received on 1 December 1997 and 28 November 1998, respectively. The applications were rejected as the migration office found that neither of the authors met the criteria set out in section 7 of the National Council Act No. 283/1995 Coll. on Refugees, that they had a well-founded fear of persecution on the grounds of race, nationality or religious or political opinions or belonging to a specific social group, as a result of which they could not or did not want to return home.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

2.3 The authors appealed these decisions to the Minister of the Interior who is advised by the Special Commission of the Ministry of the Interior. Both authors were represented by counsel. The Special Commission of the Ministry of the Interior makes its recommendation on the basis of written documentation only and does not provide for oral hearings. The authors' appeals were rejected.

2.4 The authors then appealed their cases to the Supreme Court on the grounds that the authorities had incorrectly evaluated the facts and evidence of their cases. The authors submitted material evidence of the situation in Afghanistan in support of their arguments. Their applications were considered without oral representations from the authors and both appeals were dismissed by a decision of 27 October 1998.

2.5 Following their initial complaint, the authors informed the Committee that, pursuant to an application by the Attorney-General, the Constitutional Court reviewed the provisions of the Civil Code, which allowed the Supreme Court to consider appeals of decisions of administrative bodies without providing for an oral hearing for the alleged victim. In a decision, dated 22 June 1999, the Court found this law unconstitutional. The law was subsequently amended to allow for oral hearings in such cases.

The complaint

3.1 In their initial submission, the authors claim a violation of article 14 as they did not have a public hearing because they were not given an opportunity to make oral representations on their appeal to the Minister of the Interior or to the Supreme Court.

3.2 The authors also claim that they were not provided with interpreters, either for their appeals to the Minister of the Interior, or to the Supreme Court. They contend that the equal rights of parties to a case before a court of law, as well as their right to equality before the law, guaranteed in articles 2 and 26 of the Covenant, have therefore been violated. In addition, the authors claim that although under Slovak law they have the right to have their court decisions declared in public and the judgement interpreted to the victim in his/her language, the authors were both denied this right.

Observations by the State party on admissibility

4.1 By note verbale, of 16 November 1999, the State party made its submission on the admissibility of the communication. The State party contends that the authors have not exhausted domestic remedies and requests the Committee to declare the case inadmissible. Under section 243 (e) and (f) of the Code of Civil Procedure, which came into force on 1 July 1998, the authors had the option of making extraordinary appeals to the "Prosecutor General", if they believed that a valid ruling of a court violated the law. Under this procedure, the State party explains that if the Prosecutor General finds that the law has been violated he (the

Prosecutor General) may lodge an extraordinary appeal with the Supreme Court. A different panel of the Supreme Court, to the one that determined the cases at the third instance, would examine such an extraordinary appeal.

4.2 The State party also states that, on 13 November 1998, both authors made a *second application for refugee status* but were both dismissed in a decision, dated 10 February 1999, as they failed to meet the criteria set out in section 7 of the National Council Act No. 283/1995 Coll. on Refugees. The authors' subsequent appeals to the Minister of the Interior were similarly rejected and this issue is currently before the Supreme Court for review, for this reason, the State party contests that the authors have not yet exhausted domestic remedies.

Comments by the authors

5.1 On the question of non-exhaustion of domestic remedies, the authors contest the State party's argument that an appeal to the "Prosecutor General" would be an ineffective remedy. The authors state that as the initiation of such proceedings depends exclusively on the Prosecutor and not on the authors alone, this remedy is neither available nor accessible to them.[2]

5.2 On the State party's claim that domestic remedies have not been exhausted as they are still employing procedures with respect to their *second application for refugee status*, the authors argue that as these appeals relate to a different application, which is not the subject of this communication, the exhaustion of domestic remedies in this regard is not relevant.

5.3 The authors reiterate that the law relating to the absence of oral hearings during the Supreme Court appeal has been amended, but argue that article 14, paragraph 3, of the Covenant is violated as parties to such procedures are informed prior to the hearing that their presence in court is not compulsory, and in the authors' opinion this is a means to prevent parties from exercising their right to an oral hearing.

Additional submission by the State party and the authors' comments thereon

6.1 In a note verbale, dated 7 March 2001, the State party submitted additional information in relation to this communication. The State party confirms that the authors *first asylum applications* were heard by the Supreme Court on the basis of written information only, as the Constitutional Court's decision which deemed the law against oral hearings unconstitutional, was not decided until 22 June 1999, and the authors' cases were before the Supreme Court on 27 October 1998. However, it does submit that the decision was handed down in public and that the parties to the proceedings had been duly notified of the day of announcement.

6.2 The State party confirms that the authors' appeals to the Supreme Court relating to their *second applications for asylum*, which had not been decided at the date of its first submission, were rejected on 16 November 1999.

6.3 The State party submits that with respect to their *second asylum applications* interpreters were provided for both authors during the Supreme Court Appeal. However, Mr. Yama, did not avail of this facility as he was not present during the proceedings, despite having been notified,[3] and his lawyer did not insist on the proceedings being held in the presence of his client. With respect to the case of Mr. Khalid, the State party submits that he was present, was given the opportunity to be heard by the Supreme Court and did avail himself of the use of his interpreter.[4]

6.4 The State party also submits that even though the authors were not granted refugee status they were both granted permanent residence permits in 1999 (Mr. Yama on 7 September 1999 and Mr. Khalid on 5 November 1999) and therefore their fear of returning to Afghanistan is no longer realistic.

7. In response to the State party's submission, the authors reiterate their claims and point to the fact that only 10 asylum-seekers out of 1,556 applications were granted refugee status by the Slovak Republic in the year 2000.

Issues and proceedings before the Committee

8.1 Before considering the claims contained in the communication, the Human Rights Committee must, in accordance with rule 87 of the rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. With respect to article 5, paragraph 2 (b) of the Optional Protocol, the Committee considers that the authors have exhausted available and effective domestic remedies.

8.3 As to the author's claims that their rights under articles 14 and 26 were violated as they were not given an opportunity to make oral statements or to avail of interpretation facilities while their asylum applications were considered on appeal, the Committee notes the information provided by the State party that these rights were afforded to the authors during the appeal to the Supreme Court with respect to their second asylum applications. As the authors have not denied that this was the case, the Committee finds that this part of the communication is inadmissible as the authors have failed to show that they have a claim within the meaning of article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under article 2 of the Optional Protocol;

(b) This decision be communicated to the authors and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Optional Protocol entered into force for The Czech and Slovak Federal Republic on 12 March 1991. The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 1 January 1993, the new Slovak Republic notified its succession to the Covenant and Optional Protocol.

[2] Counsel refers to the opinion of Daniel Svaby who gave a lecture in Bratislava on the exhaustion of domestic remedies under article 26 of the European Convention on Human Rights. In his lecture, he refers to a case of the European Court of Human Rights, *H v. Belgium* (No. 8950/80, judgement 16.5 1984, DR No. 37, P. 5), in which it was decided that domestic remedies had been exhausted, despite the fact that an application could have been made to the Attorney-General, as the initiation of such proceedings depended exclusively on the Prosecutor and not on the complainant.

[3] The State party has provided evidence of this in the form of a letter from the court administrator who referred to the minutes of the hearing.

[4] The State party has provided evidence of this in the form of a letter from the court administrator.

H. Communication No. 881/1999, *Collins v. Australia**
(Decision adopted on 29 October 2002, seventy-sixth session)

Submitted by:	Mr. Robert Collins
Alleged victim:	The author
State party:	Australia
Date of communication:	14 September 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 October 2002,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Robert Collins, an Australian citizen, currently in detention in South Australia. He claims to be a victim of a violation by Australia of article 10, paragraphs 1 and 2 (a), of the Covenant. He is not represented by counsel.

Facts as presented by the author

2.1 From 26 April 1994 to 21 April 1997, the author was an inmate at Adelaide Remand Centre. From 26 April 1994 to 18 January 1995, the author was an accused person held on remand[1] and housed with convicted persons. The author was not "doubled-up"[2] with a convicted prisoner during this period but had to share the prison facilities with convicted inmates. From 18 January 1995 to 29 March 1996, he was held as a "dual status" prisoner, which meant that he was a convicted prisoner with respect to one offence and accused on another charge. From 29 March 1996 to 21 April 1997, the author was held as a convicted prisoner.

2.2 On 13 February 1997, the author commenced an action in the South Australian Supreme Court against the State Government. He contended that the doubling-up, which was taking place in Adelaide Remand Centre, was contrary to international standards and complained that it caused increased sexual assaults on inmates, assaults on correctional staff, non-smokers being made to share with smokers, and increased communication of communicable diseases. He sought a declaration that the Department of Correctional Services had breached human rights.[3]

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

2.3 From 21 April 1997 to November 1997, the author was transferred to and held as a sentenced prisoner in Mobilong Prison. He was charged with another offence during this period. From November 1997 to November 1999, the author was transferred to and held as a dual status prisoner at Yatala Labour prison.

2.4 On 25 June 1999, the Supreme Court delivered a judgement against the author holding that the Department of Correctional Services had breached the Standard Minimum Rules for the Treatment of Prisoners at the Adelaide Remand Centre, and also breached article 10, paragraphs 1 and 2, of the Covenant, which it confirmed as part of domestic law.[4] However, the judge decided that the State of South Australia was not bound by the Human Rights and Equal Opportunity Commission Act, to which the International Covenant on Civil and Political Rights is a schedule, as section six of this Act excludes its direct operation at State level. It also decided that the Administrative Decisions Act 1995, enacted in South Australia, removes any legitimate expectation that administrative decisions will conform with the terms of treaties, conventions or covenants at international law. In addition, he decided not to issue a declaration in this case as it would be impossible or inconvenient to provide practical relief, which would necessarily involve removing all doubled-up cells and therefore require the construction of a new correctional institution. In the judge's view the Courts could not direct the Government how to spend its money.

2.5 From November 1999 to May 2000, the author was transferred to and held as a dual status prisoner at Adelaide Pre-Release Centre. From May 2000 to August 2000, the author was transferred to and held as a dual status prisoner at Yatala Labour prison. From August 2000 to date, the author has been held as a convicted prisoner at the same facility.

2.6 The author provides some general information on the corrective facilities in South Australia. By way of example, he states that in Adelaide Remand Centre, the number of inmates has increased from 166 to 240 because of the doubling-up, that the building has no natural air in the cells and very little natural light, and that the occupants are restricted in their movements and in their access to fresh air. In Yatala prison, he states that, although an entire floor is now used to house accused prisoners, these prisoners "mix" with other prisoners and do not receive "any special conditions". They only have a right to receive a 10-minute telephone call per day, which must be booked the day before.

The complaint

3.1 The author alleges that due to the doubling-up in South Australian corrective facilities, in particular the Adelaide Remand Centre, his rights under article 10, paragraph 1, of the Covenant were violated. In this context, he makes a variety of complaints to the Committee, being those advanced to the Supreme Court, as to the deleterious effects of doubling-up. Such effects are said to include increased incidents of assault, including sexual assault, a decrease in the quality of life and feeling of safety, non-smokers forced to share cells with smokers, persons with communicable diseases placed in cells with persons with no diseases, and having to go to the toilet in the cell one metre from the bottom of the bed and in full view of the other occupant. Although the author was not doubled-up during his time in the Adelaide Remand Centre, he claims to have been put under stress because of the effect doubling-up had on the inmates of the facility as a whole.

3.2 The author also claims that the fact that he was held as an accused prisoner and housed in facilities with sentenced prisoners, from 26 April 1994 to 18 January 1995, constitutes a violation of article 10, paragraph 2 (a).[5] He also states that while he was a dual status prisoner, he should also have been entitled to segregation from other prisoners.

State party's submission on the admissibility and merits of the communication

4.1 By note verbale of February 2001, the State party made its submission on the admissibility and merits of the communication. On the admissibility of the communication, the State party claims that the author's case is inadmissible as he has not fulfilled the victim requirement of article 1, has failed to exhaust domestic remedies and has no claim under the Covenant. The State party highlights that in his action to the Supreme Court of Australia, the author sought a declaration that the State of South Australia, through the Department of Corrective Services, had breached the International Covenant on Civil and Political Rights and as to whether and to what extent the Covenant has been enacted into domestic law and was binding on the State of South Australia. The State party submits that the author did not claim in this action that he was a victim of any alleged violation of article 10 of the Covenant.

4.2 The State party submits that in his communication the author has failed to substantiate that he has been a victim of any alleged violation of article 10. Rather, he provides information regarding a number of South Australian corrective facilities and alleges a number of incidents that have taken place in these institutions but which do not involve and are not related to his own situation. The State party refers to the Committee's jurisprudence[6] on the interpretation of article 1 of the Optional Protocol according to which an author must demonstrate that he/she is a victim of alleged violations of the Covenant. The State party submits that the author has not claimed that he, as an individual, has been a victim of any violation. Therefore, the State party submits, that the Committee cannot express a view on the law in the abstract and that the communication should be dismissed as inadmissible.

4.3 In addition, the State party submits that the communication is inadmissible for failure to exhaust domestic remedies as required under article 2 of the Optional Protocol. According to the State party the author could have instituted an appeal to the Full Court of the Supreme Court of South Australia. Although the time limit to lodge such an appeal has now expired, it is still open to the author to lodge an application seeking an extension of time to appeal to the Full Court. The author also has recourse to seek leave to appeal to the High Court of Australia in the event that any appeal to the Full Court of the Supreme Court of South Australia fails, or where an extension of time to appeal to the Full Court of the Supreme Court of South Australia is refused.

4.4 The State party submits that the author has no claim under the Covenant. In relation to the claim that the author was not segregated from convicted prisoners when he was held on remand, the State party refers to its reservation to article 10, paragraph 2 (a) and (b). The State party submits that there have been no objections filed by other State parties to the Covenant and received by the Secretary-General to the Australian reservation to article 10. It argues that the reservation is in accordance with the Committee's guidelines on reservations as set out in general comment No. 24.[7] In addition, it refers to article 19, paragraph 3, of the Vienna Convention on the Law of Treaties, which provides that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty. The Covenant neither prohibits reservations generally nor mentions any type of permitted reservation. For these reasons, the State party submits that, the author has no claim under the Covenant in respect of this article.

4.5 On the merits, and in the event that the Committee finds the claims concerning doubling-up admissible, the State party submits that this claim has no merit as the author has failed to describe how the treatment he has received in South Australian prisons has breached article 10, paragraph 1, of the Covenant. Although the author claimed a number of consequences of doubling-up in his action against South Australia, he does not describe how it would amount to a violation of article 10, paragraph 1. In fact, the State party notes that the author has not stated that he shared a cell with another prisoner. However, according to the State party, it appears from the departmental records that the author was doubled-up for a temporary period of one month in December 1997 in Yatala Labour Prison, after which he was transferred to a single cell.[8]

4.6 On the issue of the Standard Minimum Rules for the Treatment of Prisoners, the State party refers back to the drafting of the Covenant and submits that it was expressed at the time that formally linking the Rules to the article was undesirable because the Committee had not discussed or studied them in detail and some of the provisions might be contrary to the spirit and letter of the draft convention. It is submitted therefore that, although the Rules may be taken into account in determining the standards for humane conditions, the Rules do not form a code, nor are States parties required to adhere to the Rules in order to comply with the Covenant. It is further submitted that these rules do not have the force of law in Australia.

4.7 The State party refers to rule 9 (1) of the Standard Minimum Rules for the Treatment of Prisoners which states "where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself", and submits that the exception to the rule is for temporary overcrowding. It submits that the Australian Department of Corrective Services only uses doubling-up where single cell accommodation is not available. It is stated that the prison population has reduced in the last few years, despite earlier predictions that it would increase. Fluctuations in the prison population make it difficult to assess whether new facilities are required at significant cost to the taxpayer, particularly given the lead times necessary for new facilities to be constructed. As a result, doubling-up becomes necessary to accommodate fluctuations in the prison population. The Australian Government submits that although doubling-up occurs in South Australian prisons, this is on a temporary basis corresponding to fluctuations in the prison population.

4.8 The State party again refers to the judgement of the Supreme Court in which the judge referred to a statement made by the author that "there is no respect for human dignity when one is made to go to the lavatory within one metre of the person in the bottom bed and in his full view". The State party submits that it is not unusual for members of the same sex to share facilities where a large group of persons are accommodated. Taking into account the jurisprudence of the Committee,[9] the State party submits that it could not be reasonably asserted that the author's complaint meets the threshold of either inhuman treatment, or a failure to respect the dignity of the human person. In this regard, the State party makes reference to the types of conditions and treatment afforded to prisoners which was previously held by the Committee to be a violation of article 10, paragraph 1, including incommunicado detention, poor hygiene standards, inadequate exercise and insufficient food, and beatings by prison personnel.[10]

In the State party's view, prison conditions in which the Committee has found a violation of article 10, paragraph 1, are of a much more serious nature than those described in the claim made by the author.

Comments by the author

5.1 The author responds to the State party's submission on admissibility by asserting that he has exhausted domestic remedies. According to the author, the judge of the Supreme Court of South Australia "claimed that I would not be given leave to appeal these matters because of the legislation enacted by the Governments concerned". He further states that he did not wish to waste the courts' time by appealing a matter which could not be decided in his favour because of legislation which specifically prevented the application of international law. He also states that an application to the Human Rights and Equal Opportunities Commission was rejected.

5.2 On the State party's response on the merits, the author reiterates the finding of the Supreme Court of South Australia as outlined in paragraph 2.4. The author claims that the doubling-up is contrary to article 10, paragraph 1, as it involves an individual having to sleep in the same room with another, being subjected to sexual harassment and "pressures", having to go to the toilet in front of the other occupant and within one metre from the other person's bed, having to watch another person going to the toilet and possibly sharing with a sentenced person. In a subsequent letter, he confirms that he was doubled-up in Yatala Labour Prison[11] and had to use the toilet in full view of the other inmate.

5.3 On the issue of the State party's reservation to article 10, paragraph 2, of the Covenant, the author states that this reservation was "nullified" by the inclusion of the Covenant on Civil and Political Rights in a schedule to the Human Rights and Opportunities Commission Act 1986 without any reference to the reservation.

5.4 The author goes on to argue why, in his view, the State of South Australia is bound by the International Covenant on Civil and Political Rights and bound to implement the Standard Minimum Rules for the Treatment of Prisoners and regrets that the State party failed to mention the Administrative Decisions (Effect of International Instruments) Act (SA) 1995 and other domestic legislation.

Additional observations by the State party

6.1 In response to the author's comments, the State party submits that the determination of the judge in the Supreme Court of South Australia is not determinative of the issues under international law and his views should not be substituted for those of the Committee.

6.2 With respect to the definitions of article 10, paragraphs 1 and 2, of the Covenant, the State party submits that the provisions and words of the Covenant have an autonomous independent meaning differing from meanings within domestic law.[12] Any findings relating to the words of "humanity" and "inherent dignity" within a domestic court cannot be substituted for the independent assessment of the Committee. As the judge did not make reference to any of the past views of the Committee, this implies that he did not make his decision based on the international legal meanings of the words in question. According to the State party, when the findings of the court are read in context, it is apparent, that the judge equated a failure to strictly follow the Standard Minimum Rules for the Treatment of Prisoners with a breach of article 10, paragraph 1. It states that although these rules may be taken into account in determining the standards for humane detention, they do not form a code. A failure to adhere to these Rules does not of itself lead to the conclusion that the detention violates a prisoner's humanity or inherent dignity.

6.3 In the State party's view the Administrative Decisions (Effect of International Instruments) Act 1995 (SA) is not relevant to the allegations of article 10 violations, but explains that this act affects administrative decisions and procedures under the law of the State of South Australia only to the extent that the international instrument has the force of domestic law. As a consequence, an international instrument not yet part of Australian law does not give rise to a legitimate expectation that a decision maker will make a decision in strict conformity with the instrument.

6.4 The State party submits that the inclusion of the International Covenant on Civil and Political Rights as an attachment to a piece of legislation does not, in any way, affect Australia's reservations to the Covenant. There is no rule of international law supporting the author's contention.

6.5 The State party also submits that a large part of the author's comments discuss the relationship between international law and Australia's domestic law. In particular, he examines judicial use of international law in developing the common law. In its view, an abstract discussion of Australian judicial practice is not relevant to determining whether alleged violations of article 10 are made out in this instance.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol.

7.3 With regard to the requirement of article 5, paragraph 2 (b) of the Optional Protocol on the exhaustion of domestic remedies, the Committee notes that although the author has claimed a violation of his own human rights in his communication to the Committee the case he initiated in the courts of South Australia was related to general allegations on the prison conditions. In particular, the Committee observes that the author never claimed within the Australian jurisdiction that he personally had been subjected to such treatment in prison that would be contrary to article 10 of the Covenant or any comparable provisions in domestic law. The Committee, therefore, finds that the author has not exhausted domestic remedies and that the communication is therefore inadmissible.

8. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol;

(b) This decision be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Prisoner awaiting trial and not yet convicted.

[2] When one inmate is made to share a cell, designated for one person, with another inmate.

[3] It transpires from the documentation submitted by the author that he did not claim to have experienced any of these negative effects personally but his claim was in general terms. According to the judgement, the author sought a declaration that the State of South Australia is bound by law to treat *prisoners* detained by it in accordance with the Standard Minimum Rules for the Treatment of Prisoners and insofar as the State of South Australia compels *prisoners* to occupy in pairs in a single roomed cell the defendant is thereby in breach of the same rules. The author referred to the deleterious effects of "doubling-up" in the Adelaide Remand Centre but did not refer to his own situation. During his argument the author also requested a declaration that the State of South Australia through the Department of Correctional Services "breached human rights in accordance with the articles contained in the Covenant", but again did not refer to his personal situation.

[4] The Covenant was incorporated as a schedule to the Human Rights and Equal Opportunity Commission Act.

[5] The State party made the following reservation to article 10 of the International Covenant on Civil and Political Rights, "In relation to paragraph 2 (a) the principle of segregation is accepted as an objective to be achieved progressively. In relation to paragraphs 2 (a) and 3 (second sentence) the obligation to segregate is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned." The State party ratified the Covenant on Civil and Political Rights on 13 August 1980.

[6] *JH v. Canada*, Case No. 187/1985, Views adopted on 12 April 1985, *Lovelace v. Canada*, Case No. 24/1977, Views adopted on 30 July 1981 and *ARS v. Canada*, Case No. 91/1980, Views adopted on 28 October 1991.

[7] HRI/GEN/1/Rev.4.

[8] [At this point the author was a dual status prisoner.]

[9] The State party refers to *Lloyd Grant v. Jamaica*, Case No. 353/1988, Views adopted on 31 March 1994, *Berry v. Jamaica*, Case No. 330/1988, Views adopted on 7 April 1994, *Griffin v. Spain*, Case No. 493/1992, Views adopted on 4 April 1995, and *Champagnie, Palmer and Chisholm v. Jamaica*, Case No. 445/1991, Views adopted on 18 July 1994.

[10] The State party refers to many previous decisions of the Committee including some of the Uruguayan cases, *Alberto Altesor v. Uruguay*, Case No. 10/1977, Views adopted on 29 March 1982, and *Hiber Conteris v. Uruguay*, Case No. 139/1983, Views adopted on 16 March 1983, *Soogrim v. Trinidad and Tobago*, Case No. 362/1989, Views adopted on 8 April 1993, *Luyeye Magana ex-Philibert v. Zaire*, Case No. 90/1981, Views adopted on 21 July 1983, and *Dieter Wolf v. Panama*, Case No. 289/1988, Views adopted on 26 March 1992.

[11] He does not say for how long he was doubled-up.

[12] The State party refers to *Gordon C. Van Duzen v. Canada*, Case No. 50/1979, Views adopted on 7 April 1982.

I. Communication No. 890/1999, *Krausser v. Austria**
(Decision adopted on 23 October 2002, seventy-sixth session)

Submitted by: Mr. Emmerich Krausser

Alleged victim: The author and his mother

State party: Austria

Date of communication: 27 September 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 October 2002,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mr. Emmerich Krausser, an Austrian citizen, currently residing in Blumenau, Brazil. He claims to be the victim of violations by Austria of articles 2, 12, 14, 17 and 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

1.2 Austria became a State party to the Covenant on 10 December 1978. The Optional Protocol entered into force for Austria on 10 March 1988.

Facts as submitted by the author

2.1 The author married to Elvira Krausser on 15 September 1978. In November 1978, a daughter was born. On 25 July 1980, the County Criminal Court (*Bezirksgericht für Strafsachen Graz*) convicted the author for actual bodily harm against his wife and sentenced him to pay a fine that could be substituted by 20 days of prison. The author's request for a retrial was rejected on 16 March 1981. The author brought various criminal charges against his wife and others in the course of 1980 and 1981 which did not lead to formal opening of proceedings.

2.2 On 11 March 1981, the County Court (*Bezirksgericht für Zivilsachen Graz*) granted custody over the author's daughter to the author's wife, after she had moved out of their apartment.[1] On 14 May 1981, the appeal of the author against this decision was rejected. On 7 July 1981, the County Court ordered the enforcement of its decision, i.e. the delivery of the child by the author to his wife. When execution failed, the author's wife submitted to the Public Prosecutor information against the author for withholding a minor from the custody holder.[2] The police questioned the author on 19 August 1981 upon his return from a summer holiday in Yugoslavia and criminal investigations were discontinued on 26 August 1981; the author was informed accordingly. The Public Prosecutor resumed the procedure on 10 September 1981 upon new information laid by the County Court. On 6 November 1981, the District Court ordered the author's detention and issued an international arrest warrant. Some time in autumn 1981, the author and his daughter left Austria for Brazil.[3] In August 1982, the author's mother was convicted for aiding and abetting the author at the withholding of a child from the person entitled to have custody.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

2.3 On 27 November 1989, the author applied for a regular passport for all countries, valid for 10 years, at the Austrian Consulate in Curitiba, Brazil. On 12 February 1990, the Consulate refused the issuance of a passport on the basis of the Austrian Passport Law (*Passgesetz* 1969),[4] because the author left Austria in knowledge of a criminal procedure pending against him and intending to escape criminal investigation. On 1 March 1990, the Consulate rejected the author's complaint. On 18 September 1990, the Federal Ministry of Interior (*Bundesministerium für Inneres*) rejected the formal appeal (*Berufung*) of the author on the basis of information received by the competent District Criminal Court (*Landesgericht für Strafsachen Graz*) that an international warrant for the author's arrest (*Haftbefehl*) was still in force. On 29 September 1994, the Federal Administrative Court (*Verwaltungsgerichtshof*) rejected the author's appeal against the decision of the Federal Ministry of Interior, because it was not submitted within the legal deadline.

2.4 Meanwhile, a new application for a regular passport was rejected in all instances. On 29 September 1992, the Federal Constitutional Court (*Verfassungsgerichtshof*) rejected a request for legal aid by the author to appeal the decision of the Federal Ministry of Justice, stating that there were no grounds for the assumption that the decision was based on an unlawful general regulation or that in applying the pertinent legal provisions, the ministry had apparently committed an error affecting constitutional law. Nevertheless, between 15 February 1993 and 2 July 1994, the author submitted nine further applications for a passport; all of them were rejected. With a view to receiving a passport, the author applied also for Brazilian citizenship in March 1993. The application was rejected on the basis of information received by the Ministry of Justice of Brazil from the Austrian Embassy that the author was sought by the Austrian authorities for a criminal offence penalized with more than one year of imprisonment.

2.5 On 9 January 1992, the author requested a legal-aid lawyer for the criminal procedure pending against him and claimed financial compensation for costs that would be incurred by his appearance before the investigating judge in Austria. On 2 September 1992, the District Criminal Court rejected his request and argued that a defence lawyer was not required at the early stage of the procedure and that the author did not provide sufficient details on his financial situation. On 26 April 1993, a request by the author to receive a copy of his criminal record was rejected in view of the arrest warrant, in accordance with Austrian law. The District Criminal Court rejected a new request for legal aid regarding the criminal procedure on 28 January 1996.

2.6 On 27 October 1993, the Federal Ministry of Justice (*Bundesministerium für Justiz*) issued a letter of safe conduct (*Geleitbrief*) for the author's appearance before the District Criminal Court and the arrest warrant was abrogated until 1 March 1994. However, the author did not appear at the court. On 12 July 1994, the Federal Ministry of Justice issued another letter of safe conduct valid until 1 August 1995. The Austrian Embassy issued a passport valid one year, until 1 September 1995. On 21 August 1995, the District Criminal Court recalled the arrest warrant upon request by the Office of the Public Prosecutor (*Staatsanwaltschaft beim Landgericht Graz*). On 2 October 1995, the Austrian Embassy in Brasilia issued a passport valid until 2 October 2005. All appeals pending with the Federal Administrative Court (*Verwaltungsgerichtshof*) against decisions rejecting the author's application for a passport were stayed.

2.7 On 2 July 1997, the Higher District Court (*Oberlandesgericht Wien*) rejected the author's request for legal aid to claim compensation for misconduct against the State party, because the relevant legislation (*Amtshaftungsgesetz*) does not provide for such a claim against the decisions of courts in appeal procedures. On 10 September 1997, the department of finance (*Finanzprokuratur*) rejected a compensation claim by the author, among other reasons, as statute-barred. The competent courts also rejected subsequent requests for legal aid in the same matter. On 26 February 1999, the Constitutional Court (*Verfassungsgerichtshof*) rejected a request by the author for legal aid to claim compensation for misconduct by various authorities of the State party.

The complaint

3.1 The author submits that his conviction on a charge of domestic violence was based on inconclusive facts, as appeared from subsequent expert opinions collected by him. The author claims that failure of the courts to change the decision entails a violation of article 14, paragraph 6, of the Covenant. Furthermore, the Public Prosecutor discontinued investigations of charges of false representation brought by the author against the expert witnesses heard during the trial. The author claims that he was discriminated against in violation of article 26 of the Covenant.

3.2 The author claims that the judicial procedure leading to the decision of the County Court to grant the custody over his daughter to his wife violated articles 14, paragraph 1; 17 and 26 of the Covenant. The author submits that the report by the social worker and the police report taken into account by the Court were not reliable and had been produced without his participation.

3.3 The author claims that he had not been aware of an ongoing criminal investigation against him in Austria, when he left the country. The author claims that he left Austria to escape ongoing injustice. The author submits that he was fired from his job after police officers had searched for him in his absence and that because of his previous conviction for domestic violence he was unable to find a new job. Therefore, the author had to leave Austria. The author submits that he learned of the pending criminal investigation only in February 1996, when he received the decision of the District Court rejecting his request for legal aid.

3.4 The author further submits that his mother was wrongfully convicted of complicity in withholding of a minor from the rightful custodial parent. The author claims that the procedure against his mother violated article 14, paragraph 1, 2, 3 (d), (e), (f), (g), and 5, of the Covenant. The author argues that his mother attended only primary school in Yugoslavia and is unable to understand the official German language used by the Austrian courts. In addition, she had already sight and hearing deficits in 1980. The author claims that the State party forced her to testify against herself by interrogating her without the presence of a defence lawyer.

3.5 The author claims that the Austrian Embassy in Brazil knew of his residence and business address at least since December 1989. The author submits that, therefore, the State party was able to request his extradition to Austria or his prosecution in Brazil. Furthermore, the author claims that the Austrian authorities could have interrogated him any time in Brazil since 1990. The author claims that he has been denied a public hearing and that he has been presumed guilty without possibility for defence in violation of article 14 of the Covenant.

3.6 The author claims that he had financial problems and was unable to hire a lawyer or travel to Austria himself. He attaches various income tax declarations that should indicate his financial situation. The author argues that the Austrian Embassy was fully aware of his financial situation; nevertheless, the authorities forced him to return to Austria. The author claims that the State party violated article 12 of the Covenant in denying him a passport and preventing him from leaving Brazil. In treating him differently from people in a comparable situation in Austria, the author claims that the State party violated article 26 of the Covenant.

3.7 The author claims that, furthermore, his financial and personal situation was not sufficiently taken into account by the courts when rejecting his claims for legal aid. With reference to article 2, paragraph 3, of the Covenant, the author claims that it must have been possible for him to claim compensation for financial losses caused by misconduct of authorities before the courts of the State party.

3.8 The author submits that the Austrian Embassy submitted false information to the Ministry of Justice of Brazil when the latter was considering his request for citizenship. The author claims that the State party obstructed the naturalization of the author in Brazil and, thus, violated article 15 of the Universal Declaration of Human Rights. The author submits further that the same information was brought to the attention of his employer, who dismissed him in December 1994 after the author had failed to meet a final deadline to settle his affairs and receive a passport. The author claims that due to his damaged reputation he was unable to find a new job and, as a consequence, is unable to support his family. The author claims compensation for the financial damage caused by the State party.

3.9 The author refers to the decision of the District Criminal Court of 28 February 1996 that rejected his request for legal aid and alleges that the court informed him that at the preliminary stage of the procedure he would be required to meet the investigative judge without the presence of an attorney or the Public Prosecutor. On the basis of this meeting, it would be decided whether he would be formally accused. The author claims that this practice violates article 14, paragraph 3 (g), of the Covenant as he might be forced into confession during that meeting.

State party's observations on admissibility and merits

4.1 By submission of 24 March 2000, the State party argues that the author has failed to exhaust available domestic remedies and that, therefore, the communication is inadmissible. The State party indicates that the author failed to file complaints with the Federal Administrative Court (*Bescheidbeschwerde*) on the lawfulness of the decisions of the Federal Ministry of Justice within the legal deadline of six months. Such a complaint would have allowed the court to consider any violation of human rights and quash the administrative decision.[5] However, the author's various complaints have not been successful as they were filed out of time. Furthermore, the State party submits that the author's request for a passport was already satisfied in September 1994, when he was issued a passport with a validity period of one year.

4.2 In its further submission of 12 May 2000 on the admissibility and merits, the State party alleges that the author was aware of the criminal investigation pending against him when he left Austria. The State party argues that, upon resumption of the procedure, the Public Prosecutor served a writ of summons that was deposited with the author's registered address and subsequently deposited at the post office. The author had not indicated to the authorities of the State party that he left his permanent address and the investigation officials received the information that the author stayed with the child at his permanent address during weekends. Therefore, pursuant to Austrian law, service of the information was assumed.

4.3 Already on 21 August 1990, and therefore, prior to the first decision of the Austrian Consulate in Curitiba on the author's complaint against the rejection of issuing a regular passport for all countries, valid for 10 years, the Austrian Embassy in Brasilia informed the author of the possibility of issuing a passport for only a short period that would enable him to return to Austria, provided that he committed in writing to appear before the courts. Instead, the author submitted numerous requests for issuing a passport with a regular validity period. Furthermore, in its decision of 15 April 1992, the Federal Ministry of Interior explained to the author that the rejection of his request was not a penalty, but merely a measure designed to guarantee the administration of justice.

4.4 With regard to the first letter of safe conduct, the State party submits that the author, through his own fault and despite being summoned, failed to appear before the District Court on 28 February 1994. With regard to the second letter of safe conduct, the State party submits that the District Court had informed the author that the time of the hearing could largely depend on his availability. Following his request, the author received a passport with limited validity of one year. However, the author did not appear before the District Court within the deadline of the letter of safe conduct.

4.5 On 9 August 1995, the Public Prosecutor's Office revoked the detention order and the arrest warrant, because these measures had so far proven to be ineffective. Therefore, the reasons for denying the author a passport were removed and the author was issued a passport, valid for a period of 10 years. Complaints of the author pending at the Administrative Court were no longer dealt with, because the issue was moot.

4.6 As to the alleged violation of article 2, paragraph 3, of the Covenant following the rejection of his various requests for legal aid to claim compensation for misconduct of officials, the State party refers to the cases of *Lestourneaud v. France*[6] and *K.L. v. Denmark*[7] and submits that this provision can only be violated in conjunction with one of the substantive provisions of the Covenant. Furthermore, since the compensation claims of the author were not in accordance with the relevant national legislation, the provision of legal aid was not required in the interest of justice and had to be rejected by the competent authorities.

4.7 As to the alleged violation of article 12, paragraph 2, of the Covenant with regard to the refusal of the Austrian Consulate to issue a passport valid for all countries and for a regular period of 10 years, the State party argues that the author was offered a passport with limited validity period to return to Austria. Therefore, the refusal did not constitute an interference with the author's right to freedom of movement. Should the Committee come to different conclusions, however, the State party argues that the interference was provided for by law, necessary to protect public order and consistent with the other rights contained in the Covenant and, therefore, justified pursuant to article 12, paragraph 3, of the Covenant. The

State party submits that this provision of the Covenant was clearly drafted to include measures to secure criminal prosecution. The State party refers to the cases of *Gonzales v. Peru*[8] and *Peltonen v. Finland*[9] and adds that it was, in fact, the author's own behaviour that prevented his return, including making his return dependent on the bearing of necessary expenditures for his return by the State party, which is not foreseen in national law.

4.8 The rejection of the application for a passport, furthermore, did not violate the author's right to presumption of innocence as provided for in article 14, paragraph 2, of the Covenant. Comparable with other coercive measures in the criminal investigation, the refusal of a passport is a preventive measure for securing the administration of justice. With regard to the principle of separation of powers in the Austrian constitutional system, the administrative authorities are excluded from reviewing measures issued within a criminal investigation process, when deciding on the issuance of a passport.

4.9 As to the alleged violation of article 14, paragraph 3 (d), of the Covenant, the State party argues that Austrian national law provides for legal aid in cases where a person lacks necessary financial means and the assignment of a lawyer is necessary in the interest of justice. With regard to the criminal procedure, the State party submits that the case of the author was still in the preliminary stage of investigation, where the law does not require the presence of a lawyer and, thus, the appointment of a legal-aid lawyer was not necessary in the interest of justice. With regard to the other procedures initiated by the author, the State party submits that legal aid was granted, at least, for the procedure before the Administrative Court regarding his appeal against the first decision of the Austrian Consulate in Curitiba rejecting his application for a passport. When requests for legal aid were rejected later, the respective court examined in detail the requirements for legal aid and gave full reasoning for its decision.

4.10 As to the alleged violation of article 14, paragraph 3 (g), of the Covenant, the State party submits that the author did not claim that he was actually compelled to incriminate himself, but complains of future acts he fears, if neither the Public Prosecutor nor the defence lawyer have to be present in the preliminary investigation. The State party refers to the case of *Aumeeruddy-Cziffra and 19 other Mauritian Women v. Mauritius*[10] and argues that the author failed to substantiate that the use of physical force or torture during the hearing is more than a theoretical possibility.

4.11 The State party claims further that the author failed to substantiate a violation of article 17 of the Covenant. The author's submission did not set out that the State party committed international and unlawful acts on the author's honour and reputation based on false allegations.

4.12 As to the alleged violation of article 26 of the Covenant, the State party submits that the author maintained that he did not enjoy the same protection of the law as Austrians living in Austria, but failed to set out how he was discriminated against. Furthermore, the author failed to substantiate that the denial of a passport based on the relevant national legislation and reviewed by courts was arbitrary. The State party adds with regard to the arrest warrant issued for the author that the same measure would also be taken against a person staying in Austria and might have the same financial and personal implications.

Comments by the author

5.1 In his submission of 25 September 2000, the author claims that all effective legal remedies have been exhausted in his case. The author concedes that a legal-aid attorney was appointed for the procedure before the Administrative Court regarding his request of a regular passport of 4 July 1994, however, that procedure ended with a decision of 29 September 1994 that the author missed the deadline for the appeal. The author submits that he appealed to both the Administrative Court and the Constitutional Court within the time limit as soon as he had received the positive decision on legal aid. However, the Austrian Consulate in Curitiba failed to forward his appeal in time. The author argues that taking into account the submission by the State party that the Administrative Court could have considered violations of the Covenant, the rejection of legal aid arbitrarily deprived him of his rights laid down in articles 14, paragraph 1; 26 and 2, paragraphs 2 and 3, of the Covenant.

5.2 The author challenges the contention of the State party that his claim had been satisfied when a passport was issued with temporary validity, on 16 September 1994. This passport had been issued for him to appear at the District Criminal Court and not for unlimited use for business. At that time, a decision of the Federal Ministry of Interior on his latest appeal was still outstanding. The author claims that the issuance of a regular passport was only meant to cover illegal acts and acknowledged previous violations of article 12, paragraph 2, of the Covenant.

5.3 The author submits that the intention to protect public order within the meaning of article 12, paragraph 3, of the Covenant turned, in his case, into a request to hear a suspect in a preliminary investigation. The author argued that this interrogation could have been held in Brazil any time. Furthermore, the author claims that the restriction of his right was not proportionate to a legitimate purpose and did not constitute the less severe means. While it could be proportionate to refuse a person a passport in his own country while criminal procedures are pending, in the present case the author was forced by the State party to return to his country to stand criminal investigation although the State party was aware of his difficult financial situation. Furthermore, the refusal of a passport was not consistent with other rights of the Covenant, in particular articles 26 and 14, paragraphs 1 and 2.

Examination of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with Rule 87 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2 With regard to article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the author has not submitted his case to another instance of international investigation or settlement.

6.3 With regard to article 5, paragraph 2 (b), of the Optional Protocol the Committee notes the State party's submission that the author failed to exhaust available domestic remedies. The Committee notes that the author submitted various similar applications for a regular passport that had all been rejected by the authorities of the State party. It appears from the file that the appeal of the decision on the first request of the author of 27 November 1989 was finally rejected by the Federal Administrative Court on 29 September 1994 for being filed out of time. No other final decision on any further request of the author for a regular passport appears from the submissions of the parties. With respect to the author's article 12 claim, the Committee concludes that the author did not exhaust domestic remedies, and that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With regard to the author's claims concerning the decision against his mother for aiding and abetting the author in the withholding of his daughter from the custodial parent, the Committee recalls that it can only examine individual petitions presented by the alleged victims themselves or by duly authorized representatives. The Committee notes that the author did not submit any written evidence of his authority to act on behalf of his mother. Therefore, the Committee concludes that the author has no standing before the Committee in this regard, within the meaning of article 1 of the Optional Protocol.

6.5 With regard to the author's remaining claims presented above in paragraphs 3.1, 3.3, 3.5, 3.7, 3.8 and 3.9, the Committee considers that the author has not substantiated, for purpose of admissibility, any of his claims of a violation of the Covenant. In the light of this conclusion of inadmissibility under article 2 of the Optional Protocol, the Committee need not address other admissibility conditions, including the issue whether the Committee is precluded *ratione temporis*, from considering some of the author's claims.

7. The Committee therefore decides:

(a) The communication is inadmissible under articles 1, 2 and 5 (2) (b) of the Optional Protocol;

(b) This decision shall be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Section 144 Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*): "*Die Eltern haben das minderjährige Kind zu pflegen und zu erziehen, sein Vermögen zu verwalten und es zu vertreten; sie sollen bei Ausübung dieser Rechte und Erfüllung dieser Pflichten einvernehmlich vorgehen. Zur Pflege des Kindes ist bei Fehlen eines Einvernehmens vor allem derjenige Elternteil berechtigt und verpflichtet, der den Haushalt führt, in dem das Kind betreut wird.*"

[2] Section 195 Austrian Penal Law (*Strafgesetzbuch*).

[3] It is not known when or where the author was divorced from his wife. However, it appears from the file that the author married in Brazil.

[4] Section 14, paragraph 1 (3) a, of the Passport Law (*Passgesetz*) 1992.

[5] Article 131 of the Federal Constitution; section 42, paragraph 2, of the Administrative Court Act.

[6] Case No. 861/1999, decision of 3 November 1999.

[7] Case No. 81/1980, decision of 27 March 1981.

[8] Case No. 263/1987, decision of 28 October 1992.

[9] Case No. 492/1992, decision of 21 July 1994.

[10] Case No. 35/1978, decision of 9 April 1981.

J. Communication No. 942/2000, *Jonassen v. Norway*[*] (Decision adopted on 25 October 2002, seventy-sixth session)

Submitted by:	Mr. Jarle Jonassen and members of the Riast/Hylling reindeer herding district represented by Law firm Hjort DA by Attorney Erik Keiserud.
Alleged victim:	The authors
State party:	Norway
Date of communication:	9 February 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 2002,

Adopts the following:

Decision on admissibility

1. The authors of the communication are the herdsmen of the Riast/Hylling reindeer herding district, Norwegian citizens, of Sami ethnic origin. They claim to be victims of a violation by Norway[1] of article 27 in conjunction with article 2, article 26, and article 2 of the International Covenant on Civil and Political Rights (the Covenant). They are represented by counsel.

The facts as submitted by the authors

2.1 The Samis are an indigenous people constituting an ethnic minority in Norway, and reindeer breeding is recognized as an essential part of Sami culture. This activity constitutes the main material precondition for settlement in Sami areas. In Norway there are six different reindeer herding areas. These areas are divided into smaller units called reindeer herding districts, in which one or several groups of Sami are entitled to let their herds graze.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

The text of an individual opinion signed by Committee members Mr. Louis Henkin, Martin Scheinin and Mr. Solari Yrigoyen is appended to the present document.

2.2 The authors are Sami reindeer herdsmen. They belong to the reindeer district of Riast/Hylling, an area which is traditionally used for reindeer grazing grounds every year from March/April to December/January. The boundaries of the Riast/Hylling reindeer herding district were determined by a Royal Decree dated 10 July 1894, and covers approximately 1,900 km^2. For winter herding, the authors use the Femund reindeer herding district, together with the Essand reindeer herding district, the latter also being used for summer herding. The Femund reindeer herding district is approximately 1,100 km^2. The Riast/Hylling and the Femund reindeer herding districts have been used by the authors and their ancestors since the beginning of the seventeenth century. The reindeer herding districts of Riast/Hylling, Essand and Femund constitute, together with the boundary of Elgaa, the Soer-Troendelag/Hedmark reindeer herding area. This is the southernmost of the Norwegian reindeer herding areas.

2.3 At present, the authors possess 10 herds, amounting to a total of approximately 4,500 animals (winter stock before calving). Within the district of Riast/Hylling, traditional Sami reindeer husbandry is the main livelihood and source of income for approximately 45 people of Sami origin.

2.4 Pursuant to the Norwegian Reindeer Husbandry Act of 9 June 1978, the Sami herdsmen are entitled to engage in reindeer husbandry within their designated districts. However, following the decision of the Norwegian Supreme Court on 18 November 1988, the "*Korssjofjell Case*", the Sami herdsmen are only entitled to let their reindeers graze within the district if they have acquired a right to use the specific area in question according to Norwegian law. This implies that if the owner of the land in question claims that the Sami herdsmen are not entitled to let their herd graze on their land, the Sami herdsmen have to prove that they have acquired such rights according to Norwegian law on the acquisition of rights by use since time immemorial. According to a new rule adopted by the Parliament in 1996, the Sami's claim shall prevail if the judge - after having evaluated all evidence before him - is still in doubt.

2.5 The "*Korssjofjell Case*" concerned a large part of the Femund reindeer herding district. The landowners claimed that the authors were not entitled to let their herds graze in the western parts of the district, which are suitable for winter herding. The Supreme Court decided that the authors were not entitled to let their reindeer graze in this area. The area in question covers approximately 119 km^2, and constitutes approximately 11 per cent of the district's total gross area (not including Lake Store Korssjo).

2.6 On 24 October 1997, the Supreme Court rendered its judgement in the "*Aursunden Case 1997*", concerning reindeer grazing rights in the summer reindeer herding district of Riast/Hylling. The landowners had claimed that the authors were not entitled to reindeer grazing on the privately owned out farm fields in the area. In the first instance, the Midtre Gauldal District Court, on 25 October 1994, had ruled against the authors. The authors appealed to the Frostating Court of Appeal, which dismissed the appeal on 15 December 1995. The authors then appealed the case to the Supreme Court, claiming error both in the application of law and in the establishment of facts made by the Frostating Court of Appeal. On 24 October 1997, the Supreme Court concluded that the authors were not entitled to reindeer herding on the area in question and dismissed the appeal by a majority decision (4-1).

2.7 In the "*Aursunden Case 1997*", the Supreme Court attached substantial importance to its previous judgement of 6 July 1897, concerning the rights to reindeer grazing in the western part of the disputed area. The Court considered that "*the courts were considerably closer to the* *evidence a century ago*" and that "*one must be wary of disregarding the Supreme Court's 1897 assessment of the evidence*". The area under dispute in 1897 did, however, extend further to the west than the claim presented in the 1997 Supreme Court case. Regarding the question of reindeer grazing rights in the eastern part of the area under dispute in the 1997 case, which had not been covered by the 1897 judgement, the Court found that the Supreme Court's 1897 ruling "*must have more or less the same legal force*".

2.8 The dissenting Supreme Court Justice Matningsdal, stated however, that "*In evaluating the facts of the case, I assign less importance to the 1897 Supreme Court judgement than the first-voting Justice does. If the starting point is that the grazing rights are not legally binding on the eastern part of the area, there will have to be a complete reassessment of the evidence without prejudice to the result of the Supreme Court's 1897 evaluation of evidence.*" Although the majority in the "*Aursunden Case 1997*"stated that the question in dispute in many respects implied a recurrence of the dispute that led to the Supreme Court's 1897 ruling, it made its decision on the basis of current legislation.

2.9 The disputed area in the "*Aursunden Case 1997*" constitutes 4-5 per cent of the Riast/Hylling reindeer herding district, but according to the authors, its grazing value is far more important. Furthermore, the authors' loss of the herding rights in the "*Storskarven area*", that was disputed in both the "*Aursunden Case 1997*" and the 1897 ruling and which is quite limited in size, makes it impossible for them to gain access to large continuous surrounding areas which in practice only may be accessed by encroaching on the forbidden area.

2.10 As a consequence of the Supreme Court's ruling in the "*Aursunden Case 1997*", the authors lost approximately 120 km^2 of grazing fields in the reindeer district of Ryast/Hylling. Additionally, the authors have lost approximately 33 km^2 in another court case, the "*Tamnes Case*" of 6 November 1997.

2.11 There are also other cases pending which, due to the practice of the Sepreme Court, could result in further loss of grazing fields for the authors.

2.12 First, the authors and herdsmen of the Essand reindeer herding district are engaged in a new court case concerning the north/west parts of the district, the "*Selbu Case*", covering approximately 90 km^2 of the Riast/Hylling area. In this case, the Frostating Court of Appeal on 17 August 1999 ruled in favour of the authors by a majority (3-2). The minority voted against the authors and argued in terms of the Supreme Court's majority in the "*Aursunden Case 1997*". An appeal was lodged to the Supreme Court on 19 October 1999. At the time of the authors' initial submission, the Supreme Court had not yet decided whether the appeal should be admitted.

2.13 Second, a new conflict has arisen in the "*Holtålen*", in the eastern part of Riast/Hylling reindeer herding district, covering approximately 450 km^2. However in another dispute, the so-called "*Kvipsdal Case*", concerning a small area in the middle of the Femund reindeer herding district, the court ruled in favour of the authors.

2.14 In the aforesaid "*Aursunden Case 1997*", the Supreme Court relied on the 1897 judgement, and in the latter case, the Supreme Court made reference to a Supreme Court decision from 1892 in respect of the same area. Part of the material submitted to the Supreme Court both in the 1897 case and the 1892 case, was a study on the Sami population in southern Norway published in 1888 by Professor in ethnology Yngvar Nielsen. In this study, Professor Nielsen launched a new theory in opposition to the common view up till then, implying that the Sami people had migrated from the north to the Roros area in the middle of the eighteenth century and were intruders to the area. The theory gained support from the Lap Commission which was appointed in 1889. According to the authors, the Supreme Court attached great importance to this theory, and based its judgement on the fact that farmers had settled in the area in question before the Samis entered the area. Recent research, however, shows that the Samis entered southern Norway more than 150 years earlier, and archaeological studies indicate that the Sami people has been present in southern Norway since before the Middle Ages.

2.15 To illustrate the Lap Commission's approach to the Samis, the authors have submitted the following translation of its report, page 33: *"Another matter is that one should respect the Laps' rights. But also, when evaluating the Laps' and the inhabitants' mutual rights and obligations towards one another, one must keep in mind the various circumstances of their trade, and the farmer, during his hard and difficult cultivating work, often carries hard burdens, while the Lap, whose lifestyle changes from hardship to laziness, usually escapes those."*

2.16 The Lap Commission continues as follows on page 41: " ... *when it comes to the communities of Sondre Trondhjem and Hedemarken, the farmers began cultivating land long before the Laps arrived, and had to a large extent started to exploit valleys and mountains. Therefore, there is no doubt that it is the Laps who forced themselves on the farmers and have been a nuisance ever since. In later times, the farmers apparently have cultivated acres, established mountain farms and carried out other clearance work in the mountain areas where the Laps previously might have wandered without restrictions, but usually the Laps' rights cannot be assumed to have been violated, due to the fact - as stated in the Commission's proposal of 1883 - that these rights cannot be recognized to be of such nature that they might exclude or prevent a rational development of agriculture and progress."*

2.17 At the end of the nineteenth century, the Norwegian Government issued instructions denying Sami children the right to use the Sami language in school and adopted provisions entailing that only persons who spoke Norwegian were entitled to have properties apportioned. The Ministry of Interior stated[2] on 2 February 1869 that: "... *in the economic respect and, except for the nomads of Finmark County, who remain in Norway all year round, there can be no doubt that the nomadic culture is such a great burden for Norway and that it has no corresponding advantages, that one must unconditionally desire its cessation*".

2.18 The communication is supported by the Sami Assembly, the Board of Reindeer Husbandry and the Sami Reindeer Herders' Association of Norway.

The complaint

3.1 The authors allege violations of their Covenant rights because the State party has failed to recognize and protect their right to let their herds graze on their traditional grazing grounds, in violation of article 27 in conjunction with article 2 of the Covenant. Furthermore, they allege a violation of article 26, because the Norwegian Supreme Court based its considerations on establishment of facts made in the nineteenth century when the Samis where discriminated against and the Norwegian landowners' claim for private property rights were favoured.

3.2 The authors allege that the State party has violated article 27 in conjunction with article 2 of the Covenant by failing to ensure the authors' right to enjoy their own culture. They refer to the Committee's general comments Nos. 23 and 18,[3] and to the cases of *Ominayak v. Canada*,[4] *Sara et al. v. Finland*,[5] *Ilmari Länsman et al. v. Finland*,[6] *Kitok v. Sweden*,[7] and *Jouni E. Länsman v. Finland*,[8] which concern the rights of indigenous people under the Covenant.

3.3 In particular, the authors recall that the Committee has recognized that article 27 imposes an obligation on the State parties, not only to protect immaterial aspects of indigenous culture, but also to offer legal protection for the material foundation of such culture.[9] Subsequently, for the interpretation of article 27 of the Covenant, the authors refer to article 1, paragraph 2, of the Covenant which requires that all peoples must be able to freely dispose of their natural wealth and resources, and that they may not be deprived of their own means of subsistence.[10]

3.4 With regard to the two cases of *Länsman v. Finland*, where the Committee did not find violations of article 27, the authors point to four differences between those cases and the present case. First, they allege that the question at issue in the two *Länsman* cases was whether or not an isolated action from the State party represented a denial of the rights under article 27, whereas in the present case the authors claim that the current system of justice violates these rights. Second, the reindeer herding activities in the *Länsman* cases were only disturbed by activities in the area, whereas the authors are deprived of reindeer herding areas. Due to the negative outcome of the "*Aursunden Case 1997*", the "*Korssjofjell Case*" and the "*Tamnes Case*", as well as possible negative outcomes of the pending "*Selbu*" and "*Holtaalen*" cases, the authors have experienced several reductions of their reindeer grazing rights.

3.5 Furthermore, since the Aursunden area is an integrated part of a herding area of vital importance for the district of Riast/Hylling, and by denying the authors access to Aursunden, they have practically no access to attached areas. Thus, the authors run a risk of having to close down their entire reindeer husbandry. They contend that the only means to prevent the reindeer from grazing in the area in dispute in the "*Aursunden Case 1997*" and the "*Korssjofjell Case*", would be to either fence in the outer boundary of the area, or to intensify the watching of the herds. According to the authors, neither one of the alternatives would be realistic, since the fences would be covered by snow in the winter season, and the expenses of upkeep would be unduly heavy.

3.6 Third, it should be noted that contrary to the two *Länsman* cases, the Supreme Court in the "*Aursunden Case 1997*", dismissed the appeal without discussing the authors' rights under article 27 of the Covenant. Finally, the authors point to that the Supreme Court in the "*Aursunden Case 1997*" attached decisive importance to the judgement of the Supreme Court in 1897, when the Samis where subjected to blatant discrimination.

3.7 They contend that the Norwegian Supreme Court and the State party in general have failed to protect the material foundation of the southern Sami culture in accordance with the provisions set forth in article 27 and article 2 of the Covenant, by attaching crucial importance to assessments made in a period of time characterized by discrimination and forced integration of the Sami people and by an official view that Sami reindeer breeding was a burden to the Norwegian farming population.

3.8 The authors also contend that Norwegian law regarding the acquisition of rights derived by use since time immemorial, as it has been interpreted and practised by the Norwegian courts, in itself constitutes a violation of article 27. By failing to recognize Sami culture and perception of law, and by setting the same requirements for the acquisition of the right to herd reindeer as it sets in other matters of property law, Norwegian courts have, in effect, made it impossible for the authors and Sami people in many areas, due to their nomadic lifestyle, to acquire legal grazing rights and thereby to enjoy their own culture.

3.9 To acquire legal grazing rights on the basis of use since time immemorial, the authors will have to prove to the Court that they have used the area in question for more than a 100 years. This has proven to be difficult in practice, since the requirements for the acquisition of grazing rights derived by use since time immemorial, do not take into its consideration either the specific features of reindeer herding, nor Sami culture and perception of land rights. The requirements are established on the basis of grazing rights for livestock, thus, sporadic grazing is not considered sufficient for establishing legal grazing rights.

3.10 Reindeer herding makes heavy demands on acreage, and reindeers virtually never graze in the same area year after year. Instead, reindeers make use of the whole area fitted for grazing. It is the nature for reindeer to adapt to their surroundings, the topography, the pasture situation, weather and wind conditions. These conditions determine the extensiveness of the area needed for grazing. Since the use of land is necessary for the maintenance of the authors' culture, the effect of the Norwegian requirements for land acquisition is that the authors are deprived of their fundamental rights under article 27 of the Covenant. The authors refer to the Sami Parliament's statement of 27 November 1997.

3.11 The authors contend that it is difficult to prove earlier settlements in disputed areas, since their huts and fences have been made of material that decomposes, and the Sami people has never had a written culture.

3.12 They further claim that the State party has failed to take an active role in protecting their rights, by not intervening in the numerous conflicts that have been brought before the courts by landowners of the authors' reindeer herding districts over the past 10 years. The authors and Samis in general endure years of conflicts, court actions, and personal suffering, both economically and personally, because of the State party's reluctance to intervene before the conflict is determined by a Supreme Court judgement.

3.13 The authors have requested that the State party expropriate the right to reindeer grazing in the areas of the "*Korssjofjell Case*" and the "*Aursunden Case 1997*", but the petitions are still pending before the administrative authorities.

3.14 Finally, the authors claim that the State party has violated article 2 in conjunction with article 27, by failing to ensure the authors' rights to enjoy their own culture.

3.15 In respect of their claim of a violation under article 26 of the Covenant, the authors claim that the Supreme Court in the "*Aursunden Case 1997*" judgement, failed to protect the authors from discrimination, since it based its establishment of facts on those made by the Supreme Court in 1897, at a time where the general opinion of the Samis was discriminatory. They contend that the distinction between the authors and the private landowners in the disputed area is not based on objective and reasonable criteria.

3.16 The authors contend that the domestic remedies have been exhausted through the national lawsuits of the "*Korssjofjell Case*", the "*Aursunden Case 1997*", and the "*Tamnes Case*" which have all been decided finally by the Norwegian Supreme Court. There is still a lawsuit pending, the "*Selbu Case*", and a new conflict has arisen in a large area between Aursunden and Selbu called "*Holtaalen*". Although the authors primarily request the Committee to evaluate whether the Supreme Court in the "*Aursunden Case 1997*" and the "*Korssjofjell Case*", and whether the State party in general have failed to protect the material foundation of the southern Sami culture, and whether the Norwegian legal system in itself comprises violations of the Covenant, the authors contend that the Committee should take both final and pending cases into its consideration. The authors believe that they cannot be expected to continue to make the same requests to the same national courts, on the basis of almost the same facts for each and every area within their district, before the Committee can decide whether or not the Covenant has been violated.

3.17 The authors have filed an application for expropriation to the administrative authorities in Norway so as to ensure that lands for reindeer grazing is available. Nevertheless, they consider it practically impossible to avoid that reindeer enter the areas covered by the decisions in the "*Korssjofjell Case*" and the "*Aursunden Case 1997*", and thus they run a constant risk of being charged for illegal use of these areas. The authorities have a discretionary power to decide the application for expropriation. The examination is expected to be long and the outcome is uncertain. According to the authors, it has yet not occurred that Sami herdsmen in a similar position to the authors' have been given full reparation by expropriation. In spite of the fact that the expropriation case is pending, the authors consider that after more than a hundred years of dispute with private landowners, domestic remedies should be considered exhausted or ineffective.

The State party's submission on the admissibility of the communication

4.1 By note verbale of 16 November 2000, the State party made its submission on the admissibility of the communication. The State party contests the admissibility of the claims under articles 2 and 26 for lack of substantiation, and the claim under article 27 for non-exhaustion of domestic remedies and because the authors cannot be deemed victims within the meaning of article 1 of the Optional Protocol.

4.2 In relation to the claim under article 27 and the requirement under article 1 of the Optional Protocol, it points to that the authors' "*main argument is that Norwegian law regarding the acquisition of rights derived by use since time immemorial, as it has been interpreted and practised by the Norwegian courts, in itself constitutes a violation of article 27*" and considers this to be an *actio popularis* which should not be addressed by the Committee. The State party contends that the issue before the Committee should be whether the authors' rights under the Covenant have been violated by the decisions of the courts in the specific cases, which concern the authors.

4.3 Furthermore, the State party recalls that all the court cases referred to in the communication, concern the authors' grazing rights on privately owned land, under Norwegian private law. The State party emphasizes that such cases involve the balancing of legitimate private interests, on the one hand that of the Sami population, and, on the other hand, the landowners' right to protection of their property. It recalls that private ownership is protected by the Norwegian Constitution, and as part of the First Protocol to the European Convention on

Human Rights, which is incorporated into Norwegian law, and considers that these provisions should be regarded when considering to what extent the State parties are under an obligation to implement standards in law whereby a group enjoys preferential treatment due to their ethnicity.

4.4 The State party recalls that the establishment of a reindeer herding district does not in itself establish grazing rights within that district. The herdsmen must in addition to belonging to the particular herding district, have a legal basis in Norwegian law for their grazing rights in relation to the landowners, such as use since time immemorial, contract or expropriation. In this context, it emphasizes that in both the "*Korssjofjell Case*" and the "*Aursunden Case 1997*", the Supreme Court found that the authors had not acquired grazing rights in the disputed area, i.e. the authors had never had such rights to the areas in question. This is contrary to the apparent supposition of the communication, that the grazing rights have been lost.

4.5 With regard to the authors' claims under articles 2 and 26, the State party argues that the evidential weight given by the Supreme Court in the "*Aursunden Case 1997*" to the findings in the 1897 judgement was based on the authors' arguments that the Supreme Court's assessment of the facts in 1897 had been wrongful. The essence of the authors' claims was, as opposed to the 1897 ruling, that they had acquired grazing rights to the area through sufficient use of the land since time immemorial. As regards the 1897 case, the Supreme Court stated in 1997:

4.6 *"This case involved the submission of copious evidence, with testimony from parties and witnesses on behalf of the Samis and the landowners alike. In addition, the court of first instance visited the site. At that time, a question regarding the remains of Sami settlements was also at issue. I attach importance to the fact that the courts were considerably closer to the evidence a century ago, mainly the alleged use of the area under dispute for the purpose of grazing reindeer. Several of the witnesses who testified in the court of first instance, on whose ruling the Supreme Court founded its judgement, had experience (of the situation) dating all the way back to the 1820s."*

4.7 According to the State party, the Supreme Court in 1997, also considered the authors' claims put forward to the Committee under articles 26 and 2, and found that there was no evidence supporting that the Supreme Court judges in 1897 had been biased in their assessment of evidence. The Supreme Court in 1997, stated that:

4.8 *"It is clear from the Supreme Court's judgement (of 1897) that the court attached decisive importance to comprehensive testimony on the existence and frequency of reindeer grazing in the disputed area itself. There are no grounds for the view that the court was biased from the outset in the weighing of evidence."*

4.9 The State party submits that the authors de facto request review of the court's findings as to the evidence of the case. On the basis that the authors have not adduced any material, which could give basis for a review of the Supreme Court's findings, the State party contends that the authors' claims under articles 26 and 2 of the Covenant should be declared inadmissible for lack of substantiation.

4.10 In relation to article 27 of the Covenant, the State refers to the authors' allegations that the State party has failed to fulfil its positive obligations imposed by that article, in particular by setting the same requirements for the acquisition of rights to the use of land by the Samis as it would in other matters of property law. In this connection, the State party submits that even if one presupposes that such obligations are applicable in the present case, it does not necessarily follow that the State would have to fulfil them by lowering the requirements in domestic property law with regard to the Samis. Instead, the Samis interests have been safeguarded through the institute of expropriation if sufficient grazing rights have not been established previously within the reindeer herding areas.

4.11 To that effect, the authors have been afforded the right to petition the State party to secure necessary grazing rights through expropriation. The State party submits that this option constitutes an available and effective remedy that has not been exhausted in the present case.

4.12 In that connection, pursuant to the "*Korssjofjell Case*" in which the Supreme Court stated that the administrative designation of herding districts was not decisive for grazing rights under private law, the Reindeer Husbandry Act section 31 was amended in 1996. In order to extend the Sami users' rights within the herding areas, the law was amended to allow for expropriation of land to ensure such users' rights. According to the preparatory works of the law,[11] the purpose of the amendment was to:

4.13 *"give governmental authorities the necessary means of taking active steps to secure Sami reindeer herding interests. Current legislation provides no such powers. Without such an extension of the statutory provision for expropriation, it will not be possible for the authorities to prevent or resolve conflicts"*.

4.14 Following this amendment, the principle of securing necessary grazing rights through expropriation has been part of the State party's policy, and of the Ministry of Agriculture's instructions to the concerned authorities. Furthermore, with particular regard to the areas concerned in the "*Aursunden Case 1997*" and the "*Korssjofjell Case*", the Ministry of Local Government and Regional Development in a report to the Parliament,[12] states that expropriation of reindeer herding rights may be introduced to secure the Sami situation, but that before going to the extent of expropriation, every effort should be made to achieve amicable arrangements like leasing agreements in which the State takes a part.

4.15 On 2 April 1998, the authors filed claims for expropriation to the Norwegian Government, concerning the disputed land in the "*Aursunden Case 1997*", and on 9 April 1999, concerning the "*Korssjofjell Case*". At the date of the State party's submission, these were the only petitions received by the Norwegian Government after the 1996 law amendment. In relation to the other cases invoked by the authors, they won the "*Kvipsdal Case*" and the "*Selbu Case*", the latter is still pending before the Supreme Court, and they have not filed a claim for expropriation in the "*Tamnes Case*".

4.16 According to section 12 of the Expropriation Act of 23 October 1959, the parties shall be encouraged to try and reach amicable settlements before expropriation proceedings are initiated. Regarding the "*Aursunden Case 1997*", the Ministry of Agriculture therefore appointed a negotiating committee on 4 November 1998, and the landowners appointed their own representative negotiating committee. The authors were heard during the negotiating process through meetings with the government appointed committee, and through written comments on a draft agreement and the proposed agreement with the landowners. On 4 February 2000, these committees reached an agreement that they recommended to their respective groups.

4.17 The agreement includes approximately 80 per cent of the 121 square kilometres grazing land comprising the subject of the petition for expropriation, and the erection of a reindeer fence of approximately 40 kilometres. The purpose of the fence is to facilitate the fulfilling of the herdsmen's statutory obligation to keep their reindeer under adequate control and on legal grazing land. According to the proposed agreement, the State party will pay the annual grazing rent and the cost of erecting and maintaining the reindeer fence. The State party has paid all the negotiating costs, amounting to NKr 430,000, and the stipulating cost of erecting the reindeer fence is NKr 4.2 million.

4.18 In spite of this recommended agreement, the authors advised the Ministry of Agriculture in May 2000, that they maintained their petition for expropriation. The Government is confident that the Ministry of Agriculture will secure the authors' interests either by entering into the recommended agreement and/or by deciding to expropriate. Either way, the Norwegian Government will propose to the Parliament to grant the costs involved.

4.19 The same procedure as described above will probably be applied to the petition for expropriation concerning the disputed land in the "*Korssjofjell Case*". Furthermore, the State party submits that the court decisions at issue so far have had no effect on the authors' actual use of the disputed land for reindeer herding purposes, and that the recommended agreement in the "*Aursunden Case 1997*" presupposes that the State party shall pay for the Sami use of the disputed land from the date of the Aursunden judgement of 24 October 1997.

4.20 The State party submits that the possibility of petitioning for expropriation constitutes an available remedy within the meaning of article 5 of the Optional Protocol. It considers that the Committee is not in a position to consider whether the authors are victims of a violation of article 27 as long as their expropriation petitions are pending.

The comments by the authors

5.1 By letter of 13 August 2001, the authors commented on the State party's submission.

5.2 The authors contest the State party's allegation that they are not victims within the meaning of article 1 of the Optional Protocol because it considers that the claim constitutes an *actio popularis*. They contend that they are personally affected by the law regarding the acquisition of rights derived by use since time immemorial as it has been interpreted in both the "*Aursunden Case 1997*" and the "*Korssjofjell Case*". Thus, they do not ask the Committee to review national legislation *in abstracto*, but the loss of grazing rights in disputed areas should be seen in connection with prior reductions of grazing rights in the same district due to final court decisions, as well as possible reductions due to cases pending before the courts or administrative authorities.

5.3 In this context, the authors inform that the dispute with the landowners in the Selbu municipality, the "*Selbu Case*", was decided by the Supreme Court in plenary on 21 June 2001 in favour of the authors. The first-voting Justice Matningsdal, emphasized inter alia the significance of the topography and the reindeer's extensive use of the land when deciding the content of the criterion *use* as basis for the acquisition of grazing rights according to the rules on rights derived since time immemorial. He concluded that one has to adapt the requirement of land use to the specific nature of reindeer herding, thus opening for a less intensive use of land -as compared to the herding of sheep and cows - as a basis for the acquisition of reindeer grazing rights, and he emphasized the methodological problems for the Samis to prove former use of lands as grazing areas for reindeer husbandry.

5.4 The authors contend that the approach applied in the "*Selbu Case*", was not applied in either the "*Korssjofjell Case*" or the "*Aursunden Case 1997*", thus leading to the loss of grazing areas of vital importance to the authors, in violation of their Covenant rights. Furthermore, the Supreme Court in the two latter cases seemed unwilling to pay the same attention to the topography when drawing a line between legal and illegal herding areas.

5.5 With regard to the State party's statement that the authors' claims under article 27 need to be balanced with legitimate private property interests, the authors submit that their rights under article 27 of the Covenant were not given due weight in the "*Aursunden Case 1997*" and the "*Korssjofjell Case*" judgements. They find that the practice of the law regarding acquisition of rights derived by use since time immemorial in these decisions does not take into proper account the special characteristics of reindeer herding compared with e.g. the herding of sheep and cows, and is not fitted to secure the authors' rights to practice their culture. The authors contend that this lack of due regard to the special situation of the Sami people with respect to the application of Norwegian rules on users rights has led to a distinction between Norwegian farmers and the Sami reindeer herdsmen which is not built on reasonable and objective criteria. On the contrary, the authors should have been subjected to preferential treatment pursuant to articles 26 and 27 in order to regain balance and equality between the authors and the landowners, to protect the Sami culture.

5.6 In response to the State party's allegation that the authors' supposition that they had lost the grazing areas in the disputed areas of both the "*Korssjöfjell Case*" and the "*Aursunden Case 1997*" is incorrect since the Supreme Court found that the authors had not acquired grazing rights in the disputed area in the first place, the authors state that the Supreme Court accepted that the Sami people had used the areas in question for more than 100 years, and thus maintain their allegation that the authors de facto lost their grazing rights in these areas.

5.7 In respect of their claim of a violation of articles 26 and 2 of the Covenant, the authors submit that they do not ask the Committee to evaluate all facts in the "*Aursunden Case 1997*", but maintain their allegation that the Supreme Court in that case did not make a full and independent evaluation of the facts, but instead attached decisive importance to prior evaluations of facts based upon unacceptable views of the Samis. This opinion has been supported by Professor, and now Supreme Court Justice, Jens Edvin A. Skoghoy,[13] who states the following regarding the "*Aursunden Case*":

5.8 "*In my opinion the majority in the Riast/Hylling Case attached too great importance to the ruling from 1897. The view of the public authority on the Sami culture has changed since then, and one can not rule out that the evaluation of evidence made by the Supreme Court in 1897 was influenced by the attitude of the public authorities at that time. In addition, recent historical research has supplied the Supreme Court's historical picture from that time. In my opinion, the Supreme Court should have made an independent assessment of evidence.*"

5.9 In respect of the State party's allegation that the authors have not exhausted domestic remedies by not pursuing administrative avenues for expropriation, the authors recall the principle that only such remedies must be sought that are effective and available to the authors and the application of which is not unreasonably prolonged.

5.10 With regard to the recommended agreement for the disputed areas in the "*Aursunden Case 1997*", the authors attach two letters of January 2001 from the Ministry of Agriculture, where the Ministry informs that only 38 per cent of the landowners wish to enter into the agreement. In a letter from the landowners' attorney of 26 March 2001, the landowners object to the agreement on several grounds. The negotiations have thus so far failed, and the authors question that this agreement will secure their interests.

5.11 Furthermore, the authors note that their petition for expropriation in the "*Aursunden Case 1997*" was filed more than three years ago (on 2 April 1998), and is still pending in spite of the State party's statement, that the decision regarding the land under dispute is expected in the first part of 2001. The authors consider it uncertain whether the outcome of this petition will be satisfactory.

5.12 The State party argued that the court decisions at issue so far have had no effect on the authors' actual use of the disputed land for reindeer grazing purposes. However, while awaiting the outcome of their petitions for expropriation, the authors on 25 August 2000, were subjected to a criminal charge for illegal use of the land north of Aursunden, and they fear being subjected to further charges for illegal use of the disputed areas in question. On 23 April 2001, the Uttrondelag Police District followed up the criminal charge by issuing a fine of NKr 50,000, and the authors, rejecting this fine, are awaiting trial on 7-9 January 2002.

5.13 Finally, the authors draw attention to the economic impact the private lawsuits have on the authors. In principle the authors must personally cover expenses related to the lawsuits. However, these expenses have so far been recovered from the State funded Reindeer Herding Fund, with approximately NKr 1.3 million. The consequence is that the funding of other projects through the Reindeer Herding Fund suffers.

Additional observations by the State party

6. By note verbale of 7 March 2002, the State party informed the Committee that the court of the first instance on 21 January 2002, acquitted the authors in the criminal case regarding the illegal use of land north of Aursunden. The judgement has been appealed, and is thus not final. It contends, however, that these criminal proceedings have no relevance to the present case, since they stem from a dispute between private parties.

Issues and proceedings before the Committee

7. By decision of 21 December 2000, the Special Rapporteur on new communications, decided to separate the Committee's consideration of the admissibility and the merits of the case.

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.

8.3 In respect of articles 26 and 2, the Committee notes the authors' arguments that the Supreme Court in the "*Aursunden Case 1997*" attached importance to the Supreme Court decision in 1897, and that the latter decision was based upon discriminatory views of the Samis. However, the authors have not provided information which would call into doubt the finding of the Supreme Court in the "*Aursunden Case 1997*" that the Supreme Court in 1897 was not biased against the Samis. It is not for the Committee to re-evaluate the facts that have been considered by the Supreme Court in the "*Aursunden Case 1997*". The Committee is of the opinion that the authors have failed to substantiate this part of their claim, for the purposes of admissibility, and it is therefore inadmissible under article 2 of the Optional Protocol.

8.4 In respect of the alleged violation of article 27 in conjunction with article 2 of the Covenant, the State party objects to the admissibility on the grounds that the authors are not victims in the terms of article 1 of the Optional Protocol, and that the authors have failed to exhaust domestic remedies under article 5, paragraph 2 (b) of the Optional Protocol.

8.5 The Committee notes the State party's argument that the authors' claim constitutes an *actio popularis*, since the authors cannot be considered victims of a violation by the State party of article 27 of the Covenant, in the terms of article 1 of the Optional Protocol. However, the Committee finds that the authors' claim relates to denial of their reindeer herding rights in specific areas. It therefore rejects the State party's claim that this part of the communication be rejected under article 1 of the Optional Protocol.

8.6 Regarding the State party's allegation under article 5, paragraph 2 (b) of the Optional Protocol, that the authors have failed to exhaust domestic remedies, the Committee notes that the State party has argued that the authors have not exhausted the remedy of claiming expropriation to the administrative authorities. Although the authors have pursued the domestic judicial remedies in their disputes with the landowners in the "*Tamnes Case*", the "*Aursunden Case 1997*" and the "*Korssjofjell Case*", their petitions for expropriation in the two latter cases are still pending, whereas the authors have not petitioned for expropriation in the former case. The Committee recalls[14] that for the purpose of article 5, paragraph 2 (b) of the Optional Protocol, an applicant must make use of all judicial or administrative avenues that offer him a reasonable prospect of redress. The application for expropriation, a remedy provided by the 1996 law, is still pending. It would therefore appear that domestic remedies have not been exhausted.

8.7 However, the question is whether the application of these remedies has been unreasonably prolonged. The Committee notes the authors' argument that they have pursued domestic judicial remedies for more than a century and that their petitions for expropriation, which were initiated in 1998 and 1999, are still pending, making the avenues for a remedy unreasonably prolonged.

8.8 The Committee considers that the period of time it has taken for the authors to obtain a remedy, may not be gauged from the time the Samis have litigated grazing rights, but from the time the authors themselves have sought a remedy. The Committee notes that the authors brought their claims for expropriation on 2 April 1998 in the "*Aursunden Case*" and on 9 April 1999 in the "*Korssjofjell Case*". As part of the process, a negotiation was established which recommended an agreement in February 2000, but this agreement was rejected in May 2000. This forced the authorities to reopen the expropriation procedure.

8.9 The Committee considers that the amendment of the Reindeer Husbandry Act and the subsequent negotiations aiming at providing a remedy for the authors, provide a reasonable explanation for the length of the examination of the authors' claim. It cannot conclude that that the Norwegian legislation, obliging the authors to follow the procedure of settling their claims with the landowners before bringing a claim of expropriation, is unreasonable. The Committee also notes that while the authors have been subjected to one case of a criminal charge for illegal use of the disputed land for which they have been acquitted, they have been able to continue their reindeer herding to the same extent as before the relevant Supreme Court judgements. The Committee therefore cannot conclude that the application of domestic remedies has been unduly prolonged. The authors' claim under article 27 is inadmissible for the non-exhaustion of domestic remedies, under article 5, paragraph 2 (b) of the Optional Protocol.

8.10 The Committee is of the opinion that given the new remedy provided by the 1996 law, the claim must be considered inadmissible. Nevertheless, the State party is urged to complete all proceedings regarding the authors' herding rights expeditiously.

9. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b) of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 23 March 1976.

[2] Reference is made to the proposition to the Odelsting (a part of the Parliament) from 1871, p. 31.

[3] Human Rights Committee's general comment No. 23 (50), adopted on 6 April 1994 and Human Rights Committee's general comment No. 18 (37), adopted on 9 November 1989.

[4] Communication No. 167/1984, adopted on 26 March 1990.

[5] Communication No. 431/1990, adopted on 23 March 1994.

[6] Communication No. 511/1992, adopted on 26 October 1994.

[7] Communication No. 197/1985, adopted on 27 July 1988.

[8] Communication No. 671/1995, adopted on 30 October 1996.

[9] Reference is made to *Ilmari Länsman et al. v. Finland.*

[10] See the Human Rights Committee's consideration of Canada of 7 April 1999 under article 40 of the Covenant.

[11] Proposition No. 28 to the Odelsting (1994-1995) p. 31.

[12] Report to the Parliament No. 18/1997-1998.

[13] Reference is made to his book "*Tvistemaal*" (1998), p. 757.

[14] Reference is made to *Pereira v. Panama*, Case No. 437/1990, adopted on 21 October 1994, paragraph 5.2.

APPENDIX

Dissenting individual opinion by Committee members Mr. Louis Henkin, Mr. Martin Scheinin and Mr. Solari Yrigoyen

We are of the view that the communication should have been heard on its merits. The main ground on which the majority bases its inadmissibility decision is article 5, paragraph 2 (b), of the Optional Protocol, i.e., non-exhaustion of domestic remedies. For several reasons, in our view this conclusion is erroneous.

First and foremost, we do not agree that petitioning the administrative authorities of the State party, for the purpose that they institute expropriation proceedings to secure the reindeer herding rights of the authors, is at all an effective remedy within the meaning of article 5 (2) (b) of the Optional Protocol. The authors have already exhausted one line of judicial remedies by having their case adjudicated up to the Supreme Court. The authors are not even a party in the expropriation proceedings (see, paragraph 4.16), which, therefore, cannot be taken as constituting an effective domestic remedy to be pursued by the authors. At most, the authors have exhausted their additional remedy related to expropriation simply by *filing* the petition in a manner that allows the initiation of the expropriation proceedings. What *results* from those expropriation proceedings, and within which time frame, would be a matter for the consideration of *merits* when the Committee addresses the State party's measures aimed at giving effect to the article 27 rights of the authors.

Secondly, even assuming that the actual expropriation proceedings constitute a remedy that needs to be exhausted by the authors, those proceedings are already unreasonably prolonged within the meaning of the last sentence of article 5, paragraph 2, of the Optional Protocol. After losing the *Aursunden* case in the Supreme Court - which process itself required some time - the authors filed their petition for expropriation on 2 April 1998. Almost three years later, on 26 March 2001, the proposed settlement was rejected by the landowners. Although the State party has since then made a submission to the Committee on 7 March 2002, it has not even informed the Committee of any later developments, given any explanation for the delay of four and a half years since the authors filed their petition, or presented any prospect of the time frame within which the matter will be decided. In the circumstances, the Committee should conclude that the remedy is unreasonably prolonged.

Thirdly, it appears that the article 27 rights of the authors are being affected by the Supreme Court rulings against them. Herding in areas previously used by them has become illegal, and the authors are subject to the risk of further legal proceedings and legal sanctions if they continue to herd their reindeer in those areas. It has not even been argued that the outcome of the expropriation proceedings would be relevant as a remedy for this part of the authors' claim under article 27.

Finally, in addition to the legal arguments above, there is also a reason of policy. Non-exhaustion of domestic remedies is a *recoverable* ground for inadmissibility. Even the majority of the Committee alludes to rule 92.2 of the Committee's rules of procedure, according to which the authors may later request the Committee to review its inadmissibility decision. We find it unreasonable to declare the communication inadmissible although there is a clear expectation that the authors will in the near future request revitalization of their case.

As to the authors' claim under article 26, we find that it is unsubstantiated only if their claims under article 27 are declared inadmissible. In the context of their article 27 claims, which we find admissible, the article 26 claim is in our view also admissible.

(*Signed*): Louis Henkin

(*Signed*): Martin Scheinin

(*Signed*): Solari Yrigoyen

K. Communication No. 951/2000, *Kristjánsson v. Iceland**
(Decision adopted on 16 July 2003, seventy-eighth session)

Submitted by:	Bjorn Kristjánsson (represented by counsel Mr. Ludvik Emil Kaaber)
Alleged victim:	The author
State party:	Iceland
Date of communication:	6 July 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 July 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Björn Kristjánsson, an Icelandic citizen. He claims to be a victim of a violation of article 26 of the International Covenant on Civil and Political Rights by Iceland. The author is represented by counsel. The Optional Protocol entered into force for Iceland on 22 November 1979.

The relevant legislation

2.1 During the 1970s the capacity of Iceland's fishing fleet was surpassing the yield of its fishing banks and measures became necessary to safeguard Iceland's main natural resource. After several unsuccessful attempts to restrict the pursuit of particular species and to make fishing by certain types of gear or by type of vessel subject to licence, a fisheries management system was adopted by Act 82/1983 that was based on the allocation of catch quotas to individual vessels on the basis of their catch performance, generally referred to as "the quota system".

2.2 In application of the Act, regulation No. 44/1984 (on the management of demersal fishing) provided that operators of ships engaged in fishing of demersal species during the period from 1 November 1980 to 31 October 1983 would be eligible for fishing licences. The ships were entitled to fishing quotas based on their catch experience during the reference period. Further regulations continued to build on the principles so established and these principles were transferred into statute legislation with Act No. 97/1985, which stated that no one could catch the following species without a permit: demersal fish, shrimp, lobster, shellfish, herring and capelin. With the enactment of the current Fisheries Management Act No. 38/1990 the catch quota system was established on a permanent basis.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 The first article of the Act states that the fishing banks around Iceland are common property of the Icelandic nation and that the issue of quotas does not give rise to rights of private ownership or irrevocable domination of the fishing banks by individuals. Under article 3 of the Act, the Minister of Fisheries shall issue a regulation determining the total allowable catch (TAC) to be caught for a designated period or season from the individual exploitable marine stocks in Icelandic waters for which it is deemed necessary to limit the catch. Harvest rights provided for by the Act are calculated on the basis of this amount and each vessel is allocated a specific share of the TAC for the species, the so-called quota share. Under article 4 (1) of the Act, no one may pursue commercial fishing in Icelandic waters without having a general fishing permit. Article 4 (2) allows the Minister to issue regulations requiring special fishing permits for catches of certain species or made with certain type of gear or from certain types of vessels. Article 7 (1) provides that fishing of those species of living marine resources which are not subject to limits of TAC as provided for in article 3 is open to all vessels with a commercial fishing permit. Article 7 (2) establishes that harvest rights for the species of which the total catch is limited shall be allocated to individual vessels. When quota shares are determined for species that have not been previously subject to TAC, they are based on the catch performance for the last three fishing periods. When quota shares are set for species that have been subject to restricted fishing, they are based on the allocation in previous years. Under article 11 (6) of the Act, the quota share of a vessel may be transferred wholly or in part and merged with the quota share of another vessel, provided that the transfer does not result in the harvest rights of the receiving vessel becoming obviously in excess of its fishing capacity. If those parties who are permanently entitled to a quota share do not exercise their right in a satisfactory manner, this may result in their forfeiting the right permanently. The Fisheries Management Act also imposes restrictions on the size of the quota share that individuals and legal persons may own.

2.4 In December 1998, the Supreme Court of Iceland rendered judgement in the case of *Valdimar Johannesson v. the Republic of Iceland*, stating that the Government's refusal of a fishing licence based on article 5 of the Fisheries Management Act breached sections 65 (right to equality before the law) and 75 (freedom to engage in employment of one's choice) of the Constitution. Parliament then adopted Act No. 1/1999 which provides that any Icelandic national operating a registered fishing vessel with a certificate of seaworthiness is entitled to a fishing licence. Any holder of a fishing licence is, in turn, entitled to negotiate the purchase of percentage quotas with persons owning them and to "lease" tonnage quotas at the Quota Exchange.

The facts as submitted by the author

3.1 The author states that in practice and notwithstanding section 1 of the Act fishing quotas have become a transferable property. Those who own fishing rights through the original No. 44/1984 regulation can assign quotas to others for payment. The price for tonnage quotas is determined by the Quota Exchange (governed by Act No. 11/1998, the Quota Exchange Act). The Quota Exchange is governed by a board of directors appointed by the Minister for Fisheries. It is said that the prices for quotas are so high as to preclude any gain for a fisherman not owning a quota. As a result, the fishing industry has been practically closed to new entrants. According to the author many Icelandic citizens however want to be fishermen as it is an occupation deeply rooted in Icelandic culture and also practically the only productive activity accessible to men in the prime of age. The author adds that annually thousands of tons of small fish are discarded at sea because they would count as part of the quota but could not be sold at the highest price.

3.2 In 1999, the author was working as a captain for the company Hyrnó, registered owner of the fishing vessel Vatneyri. Its owner issued a declaration on 10 February 1999 to the effect that the company's ships would be sent to fish even if they had no quota for the species caught. He claimed to be entitled to the same access to the fishing banks as others and stated that he was prepared to pay the public for this access but not private parties. Originally the ship owner's intention had been to purchase a tonnage quota for what might be caught. However, when he learned that the price for cod at the Quota Exchange was the same or higher than what could be expected to be paid for the catch on return to port, he decided to disregard the legal provisions on the grounds that they would be found unconstitutional by the court.

3.3 The author returned to port on 16 February 1999 and landed 33,623 kg of cod.
On 16 August 1999 he and the ship owner were charged with having violated Act No. 57/1996, No. 38/1990 and No. 97/1997 by having fished without having obtained a quota.
On 5 January 2000, the author and the owner were acquitted by the District Court of the Western Fjords which considered that article 7 (2) of the Fisheries Management Act was in conflict with sections 65 (Right to equality) and 75 (Freedom of employment) of the Constitution and by reference of the Supreme Court's judgement in Valdimar. The author states that his acquittal was heavily criticized by governing politicians and industry representatives and that this was perceived by some as interference with the independence of the judiciary.
On 6 April 2000 the Supreme Court of Iceland overturned the lower court's judgement. It found both the author and the owner guilty. The owner of the company was sentenced to a fine of ISK 1,000,000 and the author to a fine of ISK 600,000. The judgement was delivered by a majority of four judges, with one judge concurring on the conviction but dissenting on the sentence and two judges dissenting on the conviction.

The complaint

4. The author complains that the State party has violated article 26 of the Covenant by granting to a minority of its citizens an exclusive right to charge other citizens for access to a highly valuable, renewable natural resource previously not subject to rights of ownership, distributed over an area approximately seven times as big as the island itself, and by finding him guilty of a criminal offence on account of his refusal to respect that arrangement. He maintains that utilization of this resource by the recipients of this privilege during the period from 1 November 1980 to 31 October 1983 cannot justify this action.

The State party's observations

5.1 By note verbale of 23 January 2001 the State party challenges the admissibility of the communication on three grounds: non-exhaustion of domestic remedies (OP article 5, paragraph 2 (b)), insufficient substantiation of the author's claim that he is a victim of a violation of article 26 (section 90 (b) Committee's rules of procedure) and the communication's incompatibility with the provisions of the Covenant (OP article 3).

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5.2 With regard to the application of the principle of equality in Icelandic law, the State party emphasizes that the Icelandic judiciary is guaranteed complete independence under the Constitution and general civil law and that this applies fully in practice. The State party therefore rejects the author's statement that the Supreme Court was under improper pressure from the Government and that this influenced its decision in the author's case. In this connection, the State party refers to many policy-defining judgements, in particular based on article 65 of the Constitution which is modelled on article 26 of the Covenant, such as in the Valdimar Jóhannesson case. In the author's case, the Supreme Court likewise made a new and thorough examination of the compatibility of the Icelandic fisheries management system with the general principles of freedom of employment and equality of citizens and concluded that it was compatible.

5.3 The State party argues that the author has failed to exhaust all available domestic remedies, because he had not applied for a fishing permit which would have enabled him to have a chance of purchasing or renting a quota share. The State party notes that the prerequisite for being granted a fishing permit, i.e. that the applicant must own a vessel, has not been challenged by the author. In the opinion of the State party therefore, the author had not employed the necessary means to have harvest rights allocated.

5.4 Alternatively, the State party argues that the author has not shown how article 26 of the Covenant is applicable to his case. The State party points out that the author only makes general arguments but makes no reference to his own position and provides no analysis of whether he has been the victim of discrimination as compared with other persons in similar positions. The State party recalls that the author was an employee of the Hymó company and that at the time the company had already made use of the permanent quota share that its vessels had been allocated on the basis of article 7 (2) of the Act. The vessels of Hymó, including the vessel of which the author was captain, had received a quota share allocated on the basis of their catch performance on an equal footing with others to whom this applied. According to the State party, it must have been clear to the author that when he set out to fish after the company's harvest rights had been used up, he was committing a criminal offence. No discrimination was practiced against the author through the institution of criminal proceedings against him, as many cases are brought each year under comparable provisions of the fisheries management legislation.

5.5 Moreover, the State party argues that freedom of employment, one of the author's main arguments before the domestic courts, is not protected per se by the International Covenant on Civil and Political Rights and that in the absence of specific arguments showing that the restrictions of his freedom of employment were discriminatory the communication would be inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

5.6 As to the merits of the communication, the State party argues that no unlawful discrimination was made between the author and those to whom harvest rights were allocated. What was involved was a justifiable differentiation: the aim of the differentiation was lawful and based on reasonable and objective grounds, prescribed in law and showing proportionality between the means employed and the aim. The State party explains that public interest demands that restrictions be imposed on the freedom of individuals to engage in commercial fishing in order to prevent over-fishing. Restrictions aimed at this goal are prescribed by the detailed fisheries legislation. The State party further argues that the allocation of a limited resource cannot take place without some sort of discrimination and states that the legislature employed a pragmatic method in allocating the permits. The State party rejects the author's view that the principle of equality protected by article 26 of the Covenant is to be interpreted in such a way as to entail a duty to allocate a share of limited resources to all citizens of the State. The State party also points out that the Fisheries Management Act permits the transfer of harvest rights guaranteeing access by new parties to fishing of the stocks on which catch restrictions have been set. In this context, the State party mentions that the author's employer, the Hyrnó company, had itself assigned to other parties harvest rights that originally were allocated to the author's vessel. According to the State party, this was one of the reasons why the vessel had run out of harvest rights at the time of the offence.

5.7 The State party emphasizes that any Icelandic citizen who has at his disposal a registered vessel with a certificate of seaworthiness can apply for a general fishing permit and make catches of those fish species that are not subject to special allowable catch restrictions. Furthermore, he can receive harvest rights for those fish species that are subject to special allowable catch restrictions by purchasing a permanent quota share or a catch quota for a specific period. The State party maintains that the permanent and transferable nature of the harvest rights leads to economic efficiency and is the best method of achieving the economic and biological goals that are the aims of the fisheries management. Finally, the State party points out that the third sentence of article 1 of the Fisheries Management Act states clearly that the allocation of harvest rights endows the parties neither with the right to ownership nor with irrevocable jurisdiction over harvest rights. Harvest rights are therefore permanent only in the sense that they can only be abolished or amended by an act of law. The State party adds that a review of the fisheries management legislation is foreseen by the end of the fishing season 2000-2001.

5.8 In conclusion, the State party argues that the discrimination that results from the fisheries management system is based on objective and relevant considerations and is aimed at achieving lawful goals that are set forth in law. In imposing restrictions on the freedom of employment, the principle of equality has been observed and the plaintiff has not sufficiently substantiated his claim that he is a victim of unlawful discrimination in violation of article 26 of the Covenant.

5.9 By further submission of 25 September 2001, the State party provides additional comments on the merits of the communication. The State party explains that all Icelandic citizens are permitted to fish in the sea around the country for their own and their families' consumption and that no prohibition against this has been imposed in the regulations on fisheries management. In the State party's opinion the issue raised by the communication concerns the question of how far it is permissible to go in restricting the author's freedom to choose his employment in fishing for profit or professional purposes. The State party reiterates that no unlawful discrimination was made between the author on the one hand and those to whom harvest rights were allocated on the other hand, but that what was involved was a justifiable differentiation.

5.10 The State party notes that the author has failed to present arguments as to how he personally has been a victim of discrimination, since he presents only a general assertion that the fisheries management system violates the principle of equality, without making reference to his own position and the consequences for himself. The State party emphasizes that the author does not own a fishing vessel and that he therefore does not meet the requirements of article 5 of the Act for acquiring a general fishing permit. The State party rejects the suggestion that all Icelandic citizens should have access to harvest rights and argues that the arrangement for allocating harvesting rights under the Fisheries Management Act does not constitute a violation of article 26 of the Covenant. The State party recalls that when deciding on the allocation of limited resources, the legislature was under an obligation to respect the rights of employment of those who were already active in the sector and had invested in it. The State party concludes that the distinction which was made between the author and the other parties who had harvest rights and quota shares under Act No. 38/1990 was made for a lawful purpose, i.e. the protection of fish stocks for the benefits of the nation, and that it was based on objective and reasonable considerations.

Author's comments on the State party's submission

6.1 In his comments, dated 3 December 2001, the author concedes that save for the general atmosphere and circumstances of his conviction, there is no evidence that the requirements of article 14 were not fulfilled. He explains that since his conviction was based on the presumed compatibility of the Fisheries Management system with human rights, he is requesting the Committee to determine the validity of this premise.

6.2 With respect to the State party's objections to admissibility, the author argues that for the purposes of his communication he should be equated with his employer, having been in his service and having been sentenced as a result of his work for him. The fact that the author did not own the ship himself was irrelevant to the criminal case against him. Moreover, it is pointed out that the vessel Vatneyri of which the author was captain had a general occupational fishing licence. The author therefore had no reason to apply for a fishing permit. The author's conviction was not based on his lack of fishing permit, but because of having fished without first having obtained the necessary quota.

6.3 As to the State party's argument that the author has failed to demonstrate how article 26 applies to his case, the author argues that the State party fails to understand the essence of his complaint, which is not one of discrimination as compared with others in a similar position as a result of the establishment of the present fisheries management system but one of having been given a status different from that of others with regard to access to quotas. Others have been given an exclusive right to utilise Iceland's biggest natural resource, whereas the author only has the possibility to utilise the resource against payment to the first group. The fact that those who like the author have not been given the exclusive right to fish have equal rights among themselves, is not relevant to the author's complaint. The author states that his complaint is not of having been denied a privilege in relation to others, but on the contrary, that others have been given a privilege in relation to him. According to the author, the differentiation effected by committing the right of use of the fishing banks around Iceland to a circumscribed, privileged group is contrary to Iceland's obligations under article 26 of the Covenant.

6.4 As to the merits, the author recalls that the entrenchment of the principle of freedom of employment was deemed necessary to prevent situations of monopoly. He underlines that he has no reason to object to a fisheries management system involving privately owned and freely transferable quotas, but that he objects to exclusive fishing rights established by donation of such quotas to a particular group. In his opinion this has led to a different "status" for the two groups, resulting in a privilege of one and a corresponding discrimination against the other. In this context, the author argues that employment is not a field exempted from the scope of article 26 of the Covenant and the absence of a freedom of employment provision in the Covenant is thus of no relevance to the admissibility of the communication. The author also takes issue with the

State party's assertion that the present fisheries management system is economically and ecologically effective and argues that even if this were so, economic operations and endeavours are subject to law and economic efficiency cannot be a valid excuse for violating human rights.

6.5 As to the State party's argument that no discrimination occurred because the differentiation was justifiable, the author agrees that the protection of the fishing banks against overexploitation is a lawful aim but argues that the method selected for doing so is incompatible with international law. He further argues that the differentiation is not based on reasonable and objective criteria, because the actual requirement involved, namely membership of a group enjoying an artificially created privilege, is neither "reasonable" nor "objective". He adds that if the utilization of a certain resource can only be allocated to a limited number of people, the possibilities for the citizens to enter that number must be the same.

6.6 The author explains that he does not object as such to an arrangement by which catch entitlements are allocated to owners of individual vessels. He only objects to the situation which is perpetuated by the Fisheries Management Act but not mentioned in it, namely that such entitlements have been given to a particular group with the result that all others are obliged to purchase them from that group. In relation to the State party's argument that the differentiation is prescribed by law, the author states that entitlements to catch fish of species subject to annual total catch limitations within the Icelandic territorial fishing limits cannot be traced to any statute at all. According to the author, total allowable catch was simply distributed among those who had been engaged in fishing at a particular period, with the consequence that others were excluded. This was done by administrative regulation No. 44/1984 and the arrangement has been continued by providing in successive laws that only those who previously had been issued a catch share were eligible for a new annual issue of catch entitlements and by allowing others access through a purchase or lease of fishing rights thus issued by administrative authorities. In the author's opinion therefore the existence of Icelandic fishing quotas is traced to administrative action, not legislation.

He therefore questions the logic of the State party's assertion that harvest rights are permanent only in the sense that they cannot be abolished or amended other than by act of law, as it is hard to think of a reason why something that has not been established by law cannot be abrogated except by law.

6.7 The author maintains that the exclusive use of resources by one particular group of persons without regard to those not belonging to the group, constitutes a violation of the principle of equality. The question is not whether the people of Iceland have some kind of property right to utilise the fishing banks around Iceland, but whether those now treating the fishing banks as their own private property are entitled to do so.

6.8 The author also challenges the State party's assertion that the fisheries management system enjoys national consensus and states that in fact the system has caused unprecedented strife and discord among the Icelandic people.

Further observations from the State party

7.1 By submission of 25 February 2002, the State party addresses the author's comments. It reiterates that freedom of employment is not protected by the Covenant on Civil and Political Rights and that the Committee thus has no jurisdiction to evaluate whether the restriction of the author's freedom of employment is excessive unless it can be demonstrated that the restriction constituted a violation of article 26 of the Covenant. In fact, the State party points out that the author has not shown any particular adverse consequences for him such as loss of income.

7.2 With regard to the author's comment that his rights under article 26 of the Covenant had been violated because he had been given a different status than others who had been given harvest rights, the State party argues that it has already presented detailed arguments as to why a specific group of individuals were placed in a better position than other Icelandic citizens as regards access to shares in catches of limited fishing resources. It summarizes its arguments by saying that the aim of the differentiation is lawful and based on objective and reasonable considerations and that there is reasonable proportionality between the means employed and the aim pursued.

7.3 The State party observes that the author appears to be of the opinion that as a result of the establishment of the fisheries management system in which the allocation of harvest rights was subject to rules based on the catch performance by parties in the fishing industry over a particular period, a particular group of citizens was placed in a better position than other citizens and that consequently the rights of those who did not receive harvest rights were violated. The State party rejects the view that it is possible to conclude from the rule contained in article 26 of the Covenant that the rights in question should be allocated to a larger and at the same time less restricted group of people, who might furthermore not be active in the fisheries sector. In this context, the State party once again emphasizes that the Act permits the transfer of harvest rights guaranteeing access by new parties to fishing stocks on which catch restrictions have been set.

7.4 With regard to the author's statement that the harvest rights as provided for are in fact scarcely based on law, as they were originally issued on the basis of regulations, the State party notes that in domestic procedures the author has not challenged the legal basis for the allocation of harvest rights and considers it evident that the provisions of the Fisheries Management Act constitute a clear basis in law for the restrictions on the allocation of harvest rights of which the author complains.

7.5 Finally, the State party points out that it is striking how little bearing the author's own interests have on the entire presentation of the case, and that it would appear that the purpose of the communication is to request a theoretical opinion of the Committee as to whether the arrangements adopted by Iceland regarding fisheries management are compatible with article 26 of the Covenant. This issue is a social one with great interests for the Icelandic nation. By consciously violating the Act, the author was able to demand the opinion of the domestic courts on whether or not the Act was compatible with the Constitution and international conventions. On that occasion, the highest court took the view that the legislature's evaluation of ways of managing the nation's fisheries so as best to secure the overall interests of the nation could not be attacked providing it was based on relevant considerations. The State party emphasizes that the Icelandic legislature is better placed than international bodies to appreciate what measures are appropriate in this area, which is of great significance for the economic prosperity of the nation.

7.6 The State party also provides information showing that between 1998 and 2001 20 indictments have been issued on the basis of infringements of the Fisheries Management Act.

7.7 The State party also provides information about the revision of the Fisheries Management legislation. In September 2001, a parliamentary committee recommended that the quota system continue to form part of Iceland's fisheries management. The majority of the committee also recommended that a new policy be charted out on the payment of fees for marine resources. Draft legislation will be presented to Parliament in spring.

The author's further comments

8.1 By letter of 12 April 2002, the author comments on the State party's submission. He argues that the limitation of access to valuable resources must be achieved without granting permanent privilege to a limited group of persons. Concerning the State party's argument that the present fisheries management system is in the public interest, the author argues that the public's interest in a system of donated privilege is very indirect. The author emphasizes that he has nothing against a quota system as such, but that it is vital that the catch entitlements cannot be established by exclusion of all but some. The possibility of those left out to purchase or lease catch entitlements from those who get them free does not make such a system legitimate. If money is the means by which access to fisheries is obtained, then the money paid for the access should revert to the State as the body responsible for controlling access, but not to a clique. The author voices as his opinion that the present fisheries management system was introduced because of the influence of wealthy and politically entrenched interest groups, and that there is no necessity to limit the distribution of quota to such a limited group. The author reiterates that he was convicted for violating the fisheries management rules and that he as an Icelandic citizen is entitled to protection of the law, making the issue before the Committee a practical, not a theoretical, matter.

8.2 With regard to the information provided by the State party concerning other criminal prosecutions for offences against the Fisheries Management Act, the author states that he does not deny that other prosecutions occur but maintains that there has been no case of a comparable violation of openly disregarding the fundamental premises of the fisheries management system. Once again, the author explains that he does not complain about a system of individually owned and transferable quotas, provided that they are honestly acquired under observance of general principles.

8.3 By submissions of 8 and 12 August 2002, the author provides copies and translations of media reports on the case against him while it was before the courts. From the reports it appears that the case drew a lot of attention from Government and parliament, which debated the lower court's judgement. It appears that members of the Government expressed as their opinion at the time that a confirmation of the lower court's judgement by the Supreme Court would lead to a serious economic crisis for Iceland.

8.4 By further letter of October 2002, the author submits additional comments. He states that it is for reasons other than the conservation of the nation's fish stocks, that the politicians in power are committed to the maintenance of the fisheries management system, mainly because the abolition of the current privilege would demand a recognition of their incompetence and would affect the financial interests of a politically influential group of people. According to the author, the statements of the Prime Minister made after the lower court's judgement in his case show that he threatened a confrontation with the judiciary if the judgement were not reversed. According to the author, this led to a judgement of the Supreme Court which disregarded its first and most important duty by not applying the equality principle embodied in the Constitution.

8.5 The author reiterates that Icelandic catch entitlements are created by a closure of the fishing banks to all persons who were not active in fisheries at a particular point in time, by a distribution of the entitlements among those who were and by giving those persons an exclusive right to demand money from others for access to this resource. He concedes that this arrangement was not unreasonable given the circumstances at the time, as the operators then active might otherwise have been prevented from recovering the value of their investments. But the author argues that the legislature and the Government were under a duty to revert to a constitutional situation as soon as possible and that the arrangement should never have been made permanent, as also indicated by the Supreme Court in its Valdimar judgement.

8.6 Finally the author observes that the non-respect of one human right leads to the non-respect of others as well, and has consequences that affect society as a whole. In this particular case, the concentration of fishing rights in the hands of a small group of people has led also to a discrepancy in the protection of the constitutional rights of this group compared to the commoners who are much less likely to enjoy the protection of the Constitution.

Issues and proceedings before the Committee

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol.

9.2 The author claims that his conviction for fishing without having secured the necessary quota makes him a victim of a violation of article 26 of the Covenant, since the company for which he worked had to purchase a quota from others who had received quotas free of charge because they were active in the fishing industry in the reference period (1 November 1980 to 31 October 1983). The Committee notes, however, that the author did not own a vessel, nor had he ever requested to be given a quota under the Fisheries Management Act. He merely worked as a captain on a vessel which had a fishing licence and which had acquired quota. When the vessel's quota was exhausted and the acquisition of a new quota proved to be too expensive, he agreed to continue fishing without a quota, thereby wilfully committing a criminal offence under the Fisheries Management Act. In the circumstances, the Committee considers that the author cannot claim to be a victim of discrimination on the basis of his conviction for fishing without quota.

10. The Committee therefore decides:

(a) That the communication is inadmissible *ratione personae* under article 1 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

I. Communication No. 953/2000, *Zündel v. Canada**
(Decision adopted on 27 July 2003, seventy-eighth session)

Submitted by: Ernst Zündel (represented by counsel Mrs. Barbara Kulaszka)

Alleged victim: The author

State party: Canada

Date of communication: 21 August 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication is Ernst Zündel, a German citizen born on 24 April 1939, residing in Canada since 1958. He claims to be a victim of a violation by Canada[1] of articles 3, 19 and 26 of the International Covenant on Civil and Political Rights (the Covenant). He is represented by counsel.

The facts as submitted

2.1 The author describes himself as a publisher and activist who has defended the German ethnic group against false atrocity allegations concerning German conduct during World War II. His communication originates from a case before the Canadian Human Rights Tribunal in which he was held responsible under the Canadian Human Rights Act of exposing Jews to hatred and contempt on an Internet web site known as the "Zundelsite". From the materials submitted to the Committee by the parties it transpires that, for instance, one of the author's articles posted on that site, entitled "Did Six Million Jews Really Die?", disputes that 6 million Jews were killed during the Holocaust.

2.2 In May 1997, after a Holocaust survivor had lodged a complaint with the Canadian Human Rights Commission against the author's website, the Canadian Human Rights Tribunal initiated an inquiry into the complaint. During the hearings, on 25 May 1998, the Human Rights Tribunal refused to permit the author to raise a defence of truth against the complaint by proving that the statements on the "Zundelsite" are true. The Tribunal did not consider it appropriate to debate the truth or falsity of the statements found on the author's web site since this would only "add a significant dimension of delay, cost and affront to the dignity of those who are alleged to have been victimized by these statements".[2]

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 Shortly thereafter, the author obtained a booking from the Canadian Parliamentary Press Gallery, a non-governmental and non-profit organization to which the day-to-day administration of the Canadian Parliament's press facilities has been delegated, to hold a press briefing on 5 June 1998 in the Charles Lynch Press Conference Room in the Centre Block of the Parliament buildings. According to the author, he met the criteria for booking this conference room. In the press release announcing the press conference, dated 3 June 1998, the author indicated that he would discuss the interim ruling of the Human Rights Tribunal refusing to admit the defence of truth. In its pertinent parts, the press release reads:

> "The New Inquisition in Toronto! Government tries to grab control of the Internet!
>
> Ernst Zündel is told by the Canadian Human Rights Commission and its tribunal:
>
> - Truth is not a defence
> - Intent is not a defence
> - That the statements communicated are *true* is *irrelevant*!
>
> The interim ruling was rendered after one year of CHRT hearings, on 25 May 1998 by a Canadian Human Rights Tribunal now sitting in judgement over an American-based web site called the Zundelsite at http://www.webcom.com/ezundel.
>
> (For the complete decision see attached pages.)"[3]

2.4 On 4 June 1998, after several Members of Parliament had been contacted by opponents of the author's views who had protested against the author's use of the Charles Lynch Press Conference Room and, after the Press Gallery had refused to cancel the booking of the room, the House of Commons passed the following unanimous motion: "That this House order that Ernst Zündel be denied admittance to the precincts of the House of Commons during and for the remainder of the present session."

2.5 As a result of this motion, the author was banned from the parliamentary precincts and prevented from holding the press conference in the Charles Lynch Press Conference Room. He held an informal press conference outside the Parliament buildings on the sidewalk.

Exhaustion of domestic remedies

3.1 The author's action against the political parties participating in the passing of the unanimous motion denying him access to the parliamentary precincts as well as against certain individual members of Parliament, for violation of his right to freedom of expression (guaranteed under section 2 (b) of the Canadian Charter of Rights and Freedoms) was dismissed by the Ontario Court (General Division) on 22 January 1999. The Court held that the defendants, political parties, could be sued, whereas the claim against individual members of Parliament had to be struck out for failure to establish any reasonable cause of action. The Court argued that the

House of Commons had exercised its parliamentary privilege in denying the author access to its premises. The test of necessity was met since the motion restricting the author's access to the parliamentary precincts had been necessary to preserve to the proper functioning of the House, the reason behind that decision being to preserve the dignity and integrity of Parliament. The Court noted that the restriction of the author's right to freedom of expression only concerned the use of the precincts of the House of Commons, without generally prohibiting him to express his views.

3.2 On 10 November 1999, the Court of Appeal for Ontario dismissed the author's appeal, specifying that the jurisdictional question for the Court to consider was whether, in order to ensure its proper functioning, it was necessary for the House of Commons to have control over its precincts, including the power to exclude strangers from its premises. The question was not, however, whether it had been necessary to exclude the author from parliamentary precincts, since that would amount to an inquiry into the rightfulness or wrongness of the decision, which would render any existing privilege nugatory. Since control over its premises was a necessary adjunct to the proper functioning of Parliament, the courts would be overstepping legitimate constitutional bounds if they sought to interfere with that privilege. Given that the motion to exclude the author was no more than an exercise of control over the access by strangers to parliamentary precincts, the author's claim was based entirely on matters of parliamentary privilege and had, therefore, been properly struck out.

3.3 On 29 June 2000, the Supreme Court of Canada dismissed the author's application for leave to appeal against the decision of the Ontario Court of Appeal.

The complaint

4.1 The author claims that he is a victim of a violation of articles 3, 19 and 26 of the Covenant, as he was discriminatorily denied his right to freedom of expression.

4.2 He argues that his right to freedom of expression under article 19 of the Covenant was violated by the House of Commons' motion which excluded him from parliamentary precincts and, in particular, the Charles Lynch Press Conference Room. He argues that the motion was discriminatory and in violation of articles 3 and 26 of the Covenant, because he fulfilled all criteria for booking the press conference room, his exclusion being "the first time in Canadian history that a person has been banned from the precincts of Parliament […] because of his political views".

4.3 It is argued that the author has exhausted all domestic remedies and that the same matter has not been examined under another procedure of international investigation or settlement.

The State party's submission on the admissibility and merits of the communication

5.1 By note verbale of 10 August 2001, the State party made its submission on the admissibility and merits of the communication.

5.2 The State party contests the admissibility of the communication, insofar as the alleged violations of articles 3 and 26 of the Covenant are concerned, arguing that these claims are insufficiently substantiated. In particular, the author has failed to substantiate that he does not enjoy the Covenant rights on the same basis as women in Canada (art. 3), and that his exclusion from parliamentary precincts amounts to discrimination (art. 26). Moreover, the State party argues that the author failed to exhaust domestic remedies with regard to these claims, since his court action was restricted to the claim that the motion of the House of Commons violated his freedom of expression under the Canadian Charter of Rights and Freedoms.

5.3 While the State party does not contest the admissibility of the remainder of the communication, it submits that the author's right to freedom of expression under article 19 has not been violated. It argues that, although the motion of the House of Commons excludes the author from entering parliamentary precincts, it does not prevent him from expressing his views outside these precincts. The State party submits that article 19 does not require States to ensure that individuals have access to any place they chose to exercise that right.

5.4 The State party contends that even if the author's exclusion from the precincts were to be considered a restriction of his right to freedom of expression, such restriction was justified pursuant to articles 19, paragraph 3, and 20, paragraph 2, of the Covenant. The motion banning the author constituted a valid exercise of the House of Commons' law-making power provided for in constitutional standards which, in the case of parliamentary privileges, satisfied the "provided by law" requirement in article 19, paragraph 3, of the Covenant.[4]

5.5 The restriction imposed on the author served the purpose of protecting the Jewish communities' right to religious freedom, freedom of expression, and their right to live in a society free of discrimination, and also found support in article 20, paragraph 2, of the Covenant.[5] Thus, the Human Rights Committee, in general comment No. 11 on article 20[6], had observed that this prohibition was "fully compatible with the right to freedom of expression as contained in article 19, the exercise of which carried with it special duties and responsibilities". The fact that the author had been active for almost 30 years in the worldwide distribution of materials that deny the Holocaust and other Nazi atrocities against the Jews sufficiently explained the House of Commons' concern that he would use the facilities of Parliament as a platform to disseminate Anti-Semitic views, thereby exposing the Jewish community to hatred and discrimination. The State party argues that the motion was not only justified under articles 19, paragraph 3, 20, paragraph 2, and 5, paragraph 1, of the Covenant, but legally mandated under article 4[7] of the International Convention on the Elimination of All Forms of Racial Discrimination, to take measures to suppress the dissemination of ideas based on racial discrimination and hatred.[8] In addition to the respect for the rights of reputation of others, the author's exclusion from parliamentary precincts served the purpose of protecting public order and public morals. Since the protection of parliamentary procedure constituted a legitimate goal of "public order" within the meaning of article 19, paragraph 3,[9] the privilege doctrine and its application in the present case were consistent with that notion. Given that Anti-Semitism is contrary to the values of tolerance, diversity and equality, as enshrined in the Canadian Charter of Rights and Freedoms and other domestic human rights legislation, the motion of the House of Commons further served the protection of public morals.

5.6 The State party contends that the restrictions placed on the author were "necessary", within the meaning of article 19, paragraph 3, of the Covenant, to protect the rights of the Jewish community, the dignity and integrity of Parliament, and the Canadian values of equality and cultural diversity. Compared to the potential harm of the author's planned press conference, the detrimental effects of hate propaganda on society at large, and the impression that such a press conference carried the official imprimatur of Parliament or the Government, the restriction on the author's freedom of expression was minimal and, therefore, proportionate. It had been limited only to a particular place, the parliamentary precincts, to which no member of the public had unfettered access, and did not curtail the author's freedom to use any other forum to express his opinion, provided that his statements did not denigrate the Jewish community.

5.7 The State party submits that parliamentary privileges[10] are among the unwritten conventions forming part of the Canadian Constitution, having their source in the preamble of the Canadian Constitution Act of 1867, in historical tradition and in the principle that the legislative branch must be presumed to possess such constitutional powers as are necessary for its proper functioning. One of these privileges is the authority of the legislature to regulate its own internal proceedings. This privilege is closely related to the right of Parliament to control access to its premises by excluding strangers. Both privileges are considered essential to the legislature's ability to uphold the dignity, integrity and efficiency of its work. The importance of these privileges was emphasized by the Supreme Court of Canada in its decision in *New Brunswick Broadcasting Co. v. Nova Scotia*, where the Court held that, in reviewing the Parliament's exercise of its inherent privileges, "[t]he courts may determine if the privilege claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privileges".[11]

5.8 The State party stresses that Parliament's right to exercise exclusive control over its internal proceedings - a comparatively small sphere of legislative activity - is vital to its ability to maintain its independence from the executive and judicial branches of government. Subjecting Parliament's decision to exclude a stranger from its precincts to a system of court review would not only infringe the separation of powers principle, but would mean that such decisions are not final, thereby creating uncertainty, delay and preventing Members of Parliament from performing their important legislative tasks. The State party argues that since the legislature is better placed than the courts to determine the conditions for its efficient conduct of internal business, the courts should not interfere with the question how Parliament exercised its privileges.

5.9 In the alternative, if the Committee were to declare the author's claims under articles 3 and 26 admissible, the State party challenges this part of the communication on the merits, reserving the right to make further submissions It contends that the author was not subject to discrimination, as his exclusion from parliamentary precincts was compatible with the provisions of the Covenant and was based on reasonable grounds, serving the legitimate purpose of preventing the dissemination of Anti-Semitic speech, and upholding the Covenant rights of the members of the Jewish community.

Comments by the author

6.1 By letter of 13 November 2001, the author responded to the State party's submission. He reiterates that his complaint satisfies all admissibility requirements. Since his case had been dismissed by the courts on the very broad ground of parliamentary privilege, any complaint that he had been discriminated against would have been rejected on the same grounds. He notes that it had been argued before the Ontario Court of Appeal that its broad privilege would give Parliament the unbounded right to discriminate against any person or group.

6.2 The author argues that the privilege of Parliament to control access to its precincts does not exempt the legislative branch from the State party's international human rights obligations, especially since Parliament has consented to these obligations with the State party's ratification of the Covenant.

6.3 The author submits that, in the absence of any political means to oppose the State party's power, judicial remedies were the only avenue for the author to challenge his exclusion from the parliamentary precincts.

6.4 As far as the claim under article 19 is concerned, the author reiterates that the author fulfilled the necessary criteria for using the press conference room because the topic of the planned press conference was one of national interest. The House of Commons had banned the author from the Charles Lynch Press Conference Room to deny him the use of such a credible forum for expressing his opinion and to prevent the dissemination of his press conference by the nationwide cable channel which broadcasts press conferences held in the parliamentary press facilities.

6.5 According to the author, there was no proof that the author intended to incite hatred against Jewish people during the planned press conference. Instead, the press release stated that he was going to discuss the decision of the Canadian Human Rights Tribunal that truth could not be invoked as a defense in proceedings under section 13 of the Canadian Human Rights Act. Copies of the Tribunal decision had been prepared for distribution. However, the State party tendentiously adduced arguments of morality to introduce that aspect in the case. The author stresses that, since the author became a Canadian resident in 1958, he has never been prosecuted for or found guilty of incitement of hatred against Jewish people. His previous conviction for "spreading false news" had been overturned by the Supreme Court of Canada in 1992 on the grounds that it had violated the author's constitutional right to freedom of expression.[12]

Additional observations by the State party

7.1 By note verbale of 30 May 2002, the State party provided information on the judicial interpretation of parliamentary privilege and on the final decision of the Canadian Human Rights Tribunal in the *Citron v. Zündel*[13] case.

7.2 Pursuant to section 40 of the Human Rights Act, any individual or group of individuals claiming to be a victim of discriminatory practice may file a complaint with the Canadian Human Rights Commission. Subject to specific admissibility criteria, the Commission is mandated to investigate the complaint and, if the complaint is not dismissed, to mediate in order to reach a friendly settlement. If no such settlement can be reached, the Commission may refer the complaint to the Canadian Human Rights Tribunal, an independent, quasi-judicial body empowered to conduct hearings and to adjudicate the matter by way of order.

7.3 In July and September 1996, the Toronto Mayor's Committee on Community and Race Relations and Sabina Citron, a Holocaust survivor, lodged two parallel complaints against the author under section 13 (1) of the Human Rights Act, alleging that by posting discriminatory material on his website, the author "caused repeated telephonic communication that was likely to expose Jews to hatred and contempt". After the Human Rights Commission had referred the complaint to the Human Rights Tribunal for a hearing on the merits, the Tribunal issued its final decision on 18 January 2002, ordering that the author "or any other individuals who act in the name of, or in concert with Ernst Zündel cease the discriminatory practice of communicating telephonically" material of the type before the Tribunal and found on the "Zundelsite", "or any other messages of a substantially similar form or content that are likely to expose a person or persons to hatred or contempt by reason of the fact that that person or persons are identifiable on the basis of a prohibited ground of discrimination, contrary to s.13 (1) of the *Canadian Human Rights Act*".

7.4 Section 13 (1) of the Canadian Human Rights Act (1985) provides:

> "It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination."

The prohibited grounds of discrimination are specified in section 3 (1) of that Act:

> "For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted."

7.5 In addition to the Human Rights Act, the Canadian Criminal Code contains three provisions relating to hate propaganda: (a) advocating genocide (sect. 318), (b) public incitement of hatred (sect. 319, para. 1) and (c) wilful promotion of hatred (sect. 319, para. 2).

Issues and proceedings before the Committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.

8.3 In relation to the alleged violation of article 3 the Committee finds that the author has provided no substantiation for this claim which appears to be beyond the scope of the said provision. Consequently, the Committee considers that this part of the communication is inadmissible under articles 2 and 3 of the Optional Protocol.

8.4 With respect to the alleged violation of article 19, paragraph 2, of the Covenant, the Committee observes that the State party does not contest the author's claim that domestic remedies are exhausted in respect of the decision to exclude the author from the precincts of the House of Commons "during and for the remainder of the present session", with the consequence of preventing the author from holding the press conference he had announced. Consequently, the author's claim under article 19, paragraph 2, is not inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8.5 However, and despite the State party's willingness to address the merits of the communication, the Committee considers that the author's claim is incompatible with article 19 of the Covenant and therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol. Although the right to freedom of expression, as enshrined in article 19, paragraph 2, of the Covenant, extends to the choice of medium, it does not amount to an unfettered right of any individual or group to hold press conferences within the Parliamentary precincts, or to have such press conferences broadcast by others. While it is true that the author had obtained a booking with the Press Gallery for the Charles Lynch Press Conference Room and that this booking was made inapplicable through the motion passed unanimously by Parliament to exclude the author's access to the Parliamentary precincts, the Committee notes that the author remained at liberty to hold a press conference elsewhere. The Committee therefore takes the position, after a careful examination of the material before it, that the author's claim, based on the inability to hold a press conference in the Charles Lynch Press Conference Room, falls outside the scope of the right to freedom of expression, as protected under article 19, paragraph 2, of the Covenant.

8.6 Finally, in relation to the alleged violation of article 26 of the Covenant, the Committee finds that this part of the communication is inadmissible for failure to exhaust domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol. The Committee notes that, in his statement of claim submitted to the Ontario Court, the author claims to be a victim of a violation of his right to freedom of expression guaranteed by section 2 (b) of the Canadian Charter of Rights and Freedoms without, however, asserting a violation of his equality rights under section 15 (1)[14] of the Charter. The author's argument that any complaint to the effect that he was discriminated against would have been dismissed on grounds of parliamentary privilege is purely conjectural, and, therefore, does not absolve him from seeking to exhaust domestic remedies.

9. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2, 3 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Covenant and the Optional Protocol to the Covenant both entered into force for the State party on 19 May 1976.

[2] Canadian Human Rights Tribunal, *Citron v. Zundel*, interim decision of 25 May 1998.

[3] Italics, bolds and underlines as used in the original press release.

[4] The State party refers to a similar finding by the Human Rights Committee in *Gauthier v. Canada*, Communication No. 633/1995, Views adopted on 7 April 1999, UN Doc. CCPR/C/65/D/633/1995, 5 May 1999, at para. 13.5.

[5] In this regard, the State party refers to the Committee's jurisprudence in *Ross v. Canada*, Communication No. 736/1997, Views adopted on 18 October 2000, UN Doc. CCPR/C/70/D/736/1997, 26 October 2000, at para. 11.5 and in *Faurisson v. France*, Communication No. 550/1993, Views adopted on 8 November 1996, UN Doc. CCPR/C/58/D/550/1993, 16 December 1996, at para. 9.6.

[6] Human Rights Committee, nineteenth session (1983), general comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (art. 20), adopted on 29 July 1983, at para. 2.

[7] Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination reads:

> "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
>
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
>
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."

[8] The State party also emphasizes that, according to general recommendation XV of the Committee on the Elimination of Racial Discrimination, "the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression". See general recommendation XV: Organized violence based on ethnic origin (art. 4), adopted on 23 March 1993, at para. 4.

[9] The State party refers to the Committee's Views in *Gauthier v. Canada*, Communication No. 633/1995, Views adopted on 7 April 1999, UN Doc. CCPR/C/65/D/633/1995, 5 May 1999, at para. 13.6.

[10] In Canadian constitutional law, the notion of "privileges" refers to the legal powers of Parliament.

[11] Supreme Court of Canada, *New Brunswick Broadcasting Co. v. Nova Scotia* [1993] 1 S.C.R., at pp. 384-385.

[12] See Supreme Court of Canada, *R. v. Zundel*, [1992] 2 S.C.R., pp. 731-844.

[13] Canadian Human Rights Tribunal, *Citron v. Zündel*, decision of 18 January 2002.

[14] Section 15 (1) of the Canadian Charter of Rights and Freedoms reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

M. Communication No. 956/2000, *Piscioneri v. Spain** (Decision adopted on 7 August 2003, seventy-eighth session)

Submitted by: Mr. Rocco Piscioneri (represented by Mr. Luis Bertelli)

Alleged victim: The author

State party: Spain

Date of communication: 11 May 2000

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 August 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication is Rocco Piscioneri, an Italian citizen who is currently being held in the prison of Jaén in Spain. In his communication of 5 April 2000, supplemented on 5 January 2001, he claims to have been the victim of violations by Spain of paragraph 1, paragraph 3 (b) and paragraph 5 of article 14, and paragraph 1 of article 15 of the International Covenant on Civil and Political Rights. He is represented by counsel. The Optional Protocol entered into force for Spain on 25 January 1985.

The facts as submitted by the author

2.1 On 7 November 1997, Italy requested the extradition of the author, on the grounds that on 30 September 1997 an arrest warrant had been issued against the author for a drug-trafficking offence, following the seizure of 200 kilograms of cocaine in Feletto Canavese, Italy, and 1,385 kilograms of hashish in Barcelona, Spain. Nevertheless, this arrest warrant was annulled on 7 November 1997 by the Civil and Criminal Court of Turin on the ground that a procedural requirement had been infringed.[1] The author was then in Spain.

2.2 On 17 November 1997 the Civil and Criminal Court of Turin, Italy, issued a new arrest warrant in respect of the same events, which, according to the author, had not first been investigated by an Italian court, but had been the subject of preliminary investigation No. 979/97 by Spanish examining court No. 10.

2.3 Since, at all relevant times, the author was on Spanish territory, the Italian authorities requested his extradition again on the basis of the second arrest warrant and, by an order dated 18 May 1998, the National High Court granted extradition in respect of trafficking in cocaine but refused extradition in respect of trafficking in hashish, contending that an investigation had already begun in Spain into the latter offence. Under the order, the transfer of the author to Italy would be suspended until he had served any sentence which might be imposed on him by examining court No. 10 in Barcelona, which was seized of the matter.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.4 According to the author, the day before the preliminary hearing in the extradition proceedings,[2] he was asked only whether he was aware that a further charge had been laid against him, and consequently he did not have enough time to prepare his defence.

2.5 In opposing the extradition order, the author submitted an application for reconsideration, which was dismissed by the Criminal Division of the National High Court on 23 July 1998. Three of the judges who declared his extradition to be lawful also served in the nine-member Criminal Division of the National High Court which ruled on his application for reconsideration.

2.6 The author challenged the ruling rejecting his application for reconsideration by lodging a writ of *amparo* with the Constitutional Court, which was dismissed on 4 December 1998.

2.7 On 11 January 1999, the Provincial High Court in Barcelona sentenced the author to a prison term of six years and six months and a fine of 1 billion pesetas for trafficking in hashish. The author applied to the Supreme Court for judicial review of this sentence (*casación*), and on 9 October 2000, when the Court had not yet ruled on the application, requested the court to suspend the proceedings.[3] On 11 October 2000, the Second Division of the Supreme Court dismissed the author's request.

2.8 After the Supreme Court refused to suspend the application for judicial review, the author instituted *amparo* proceedings. The Spanish Constitutional Court dismissed the application for *amparo* on 11 December 2000, and on 8 June 2001 the Supreme Court gave its ruling on the application for judicial review, which it dismissed.

The complaint

3.1 The author lodged his complaint in two documents nine months apart. In his initial communication, dated 5 April 2000, concerning the extradition procedure, the author claims violations of article 14, paragraph 1, and article 13, contending that, if he were extradited to Italy, his case would not be heard in a competent and impartial tribunal, which would try him for trafficking in cocaine. That it was Spain that should hear his case as the country which began the investigation of the acts, and that the charges brought against him in both Italy and Spain were based on the same acts. That the principle of universal jurisdiction should also be invoked, since drug-trafficking is regarded as contrary to the interests of all States.

3.2 The author also claims a violation of article 14, paragraph 1 of the Covenant, contending that Spain had not rejected the extradition request, and that he was denied the right to be charged with a continuing offence, for which the punishment is less severe than for two offences tried separately. The author also alleges that he was denied the right to a fair trial, since the provisions of the Extradition Act, which stipulates that the extradition request must be accompanied by "*the judgement or detention order or similar decision*", were ignored, and Italy sent only a preventive arrest warrant. He adds that, in breach of the Act, extradition was initiated on the application of the requested country, namely Spain.

3.3 The author claims to have been the victim of a violation of article 14, paragraph 1 of the Covenant, arguing that the same judges who declared his extradition to be lawful formed part of the division of the National High Court which ruled on the application for reconsideration; this could have had the consequence that they exerted a certain influence on their colleagues.

3.4 The author claims to have been the victim of a violation of article 14, paragraph 3 (b) of the Covenant, contending that he was not given time to prepare his defence or properly to present to the competent court the grounds on which he opposed the new extradition request.

3.5 Also with regard to the extradition proceedings, the author claims a violation of article 15, paragraph 1 of the Covenant, arguing that the acts with which he was charged did not constitute an offence when they took place. In his view, by annulling the first arrest warrant, the Turin Civil and Criminal Court considered that the offence for which extradition was being sought did not exist, and the second extradition request was based on the same events, with the irregularity that had caused the first request to be void unrectified. In that regard, the author contends that the Spanish court had noted that any infringements of fundamental rights that originated with the foreign authorities in the original criminal proceedings could be attributable to the Spanish courts which were aware of them yet authorized his transfer. He states that despite the first arrest warrant which was annulled, the Italian court opened further criminal proceedings relating to the same events, without bearing in mind that the case had already been heard, and that Spain did not take this into account.

3.6 In another document, dated 5 January 2001, the author claims further violations relating to the proceedings in Spain. He states that article 14, paragraph 5 of the Covenant was violated because, in its ruling on the application for judicial review, the Supreme Court rejected the submission of preliminary investigation 979/79, which confirmed that a Spanish judge was already investigating the event for which his extradition was being sought. The author alleges another violation of the same article, contending that it was impossible for him to benefit from an effective remedy of judicial review of the facts in respect of the judgement handed down by the Spanish court and the sentence he received for trafficking in hashish. The author maintains that, by refusing to suspend his application for judicial review, the Constitutional Court was violating that same rule on the grounds that, since application for judicial review is not an effective remedy in Spain, his right to a second hearing would thereby be violated.

3.7 With regard to the extradition procedure, the author states that, since his application for *amparo* had been refused, no second hearing was available to him and the evidence in his favour was therefore not re-evaluated and that that constituted a violation of article 14, paragraph 5 of the Covenant.

Observations by the State party on the admissibility of the communication

4.1 In its observations dated 18 January 2001, the State party pointed out that the Barcelona Provincial Court had expressly declared that Mr. Rocco Piscioneri is a leader of a criminal organization involved in trafficking drugs and narcotics, and reminded the Committee of the serious nature of this type of activity, as highlighted in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which was referred to in the extradition proceedings.

4.2 The State party disputes the admissibility of the communication *ratione materiae*, on the grounds that the criminal trial and the extradition proceedings are separate matters. It holds that, where the trafficking in cocaine is concerned, the author cannot be tried in Spain because no criminal charges have been brought against him in any Spanish court. It notes that, under the Constitutional Court's decision, the purpose of extradition carried out at the request of another State is not to punish certain behaviour, but only to make criminal proceedings possible in the other State.

4.3 In relation to the violation of article 15, paragraph 1 of the Covenant alleged by the author, the State party points out that in its order of 18 May 1998 the National High Court confined itself to declaring that the extradition of the author to Italy on some charges was lawful, while refusing it on others; and that the court had not convicted or sentenced Mr. Rocco Piscioneri. The author's claim that the arrest warrant issued by the Turin Civil and Criminal Court, which underpinned the extradition ruling, was void, should, in the view of the State party, be challenged at the appropriate time before the Italian courts, since the Spanish National High Court does not have the authority to hear the case by applying the procedural legislation of another sovereign State, such as Italy, so that the author's assertions on this matter were similarly incompatible with the Covenant *ratione materiae*.

4.4 In relation to the claimed violation of article 14, paragraph 3 (b) of the Covenant, the State party states that this matter was not complained of either in the application for reconsideration or in the *amparo* application, so that, as the complaint had not been lodged at the domestic level, in accordance with article 5, paragraph 2 (b) of the Optional Protocol, it should be declared inadmissible.

4.5 In relation to the author's claim that article 14, paragraph 1 of the Covenant was violated because the judges who declared his extradition lawful were the same as those who ruled on his application for reconsideration, the State party argues similarly that the author did not raise this allegation at the domestic level; and that his *amparo* application contains no mention of this violation.

4.6 The State party adds that the case of Mr. Rocco Piscioneri cannot be regarded as a violation of article 13 of the Covenant since it held extradition proceedings in which a decision was adopted in accordance with the law, and in which the complainant made as many submissions as he deemed appropriate and sought all possible remedies.

4.7 In relation to the alleged violation of article 14, paragraph 5 of the Covenant, the State party holds that the complaint is inadmissible, on the grounds that, first, the judicial review proceedings had not been completed when the complainant made an *amparo* application to the Constitutional Court, and that only by considering the totality of the proceedings and the final ruling would it be possible to gauge whether the guarantees for the defence had actually been impaired in the complainant's case. The State party adds that the Committee should examine specific violations of current relevance rather than reviewing legislation in the abstract.

4.8 In relation to the author's claim that he was not allowed to present an item of documentary evidence - a copy of the preliminary investigation 979/97 - the State party emphasizes that the complaint is premature, since the Constitutional Court did not refuse the application, but, in view of the stage reached in the proceedings - with only the hearing and the judgement remaining - pointed out that it would be necessary to wait for the hearing itself, at which time it would be possible to lodge such applications as the author deemed appropriate; that meanwhile, no real and actual violation of the author's rights has taken place, and that, as the Constitutional Court stated, the author's complaint deals with a merely hypothetical, potential or possible violation.

Comments by the author on the observations by the State concerning the admissibility of the communication

5. In his comments dated 8 June 2001 and 16 August 2001, the author replies to the observations by the State party on admissibility and states that, in accordance with the Committee's case law in the *Gómez Vásquez* case, it is not necessary to wait for proceedings under way to be resolved if all the indications are that the outcome will be identical to that of the previous cases heard by the same courts, and that in this specific case, Mr. Piscioneri complained to the Spanish Supreme Court that his application for judicial review would not constitute an effective remedy, and that the reason why he had lodged a writ of *amparo* with the Constitutional Court was that his request for the suspension of the proceedings had been refused.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee observes that the author's allegations in relation to article 14, paragraph 1 refer principally to the criminal proceedings to which he might be liable on charges of trafficking in cocaine; thus he contends that he should be tried in Spain, since he would then benefit from the procedure for continuing offences. The Committee points out that such criminal proceedings are for the moment of a hypothetical or potential nature, and consequently cannot form part of the claimed violations of the articles of the Covenant. The Committee therefore considers that the author's complaint is not within the scope of paragraph 1 of article 14 of the Covenant, and thus declares this part of the communication inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.4 In relation to the extradition proceedings conducted in Spain, the author claims that he was denied the right to a fair trial since the extradition proceedings were instituted at the request of the requested State, i.e., Spain, and since the extradition request was accompanied only by a preventive arrest warrant. In this regard, the Committee notes that the author's complaint has no relation to the right protected in article 14 of the Covenant, and thus it is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.5 In relation to the author's claims that article 14, paragraph 1 of the Covenant was violated, because the judges who considered his extradition at first instance formed part of the court which ruled on the application for reconsideration, and in relation to the violation of article 14, paragraph 3 (b), in that he did not have enough time to prepare his defence, the State party points out that these complaints were not raised during the appeals initiated by the author. On the basis of the material available to it, the Committee notes that the author did not complain about the violations at the domestic level, and that, while complainants are not obliged to cite specific provisions of the Covenants which they claim to have been violated, they must mention in substantive terms, in domestic courts, the grounds which they later present to the Committee. Since he failed to lodge these complaints even in domestic courts, this part of the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

6.6 In his complaint relating to article 15, paragraph 1 of the Covenant, the author seeks to base his claims on the fact that the first arrest warrant against him issued by the Italian court was annulled, while the second, on the basis of which extradition was granted, referred to the same events without the original irregularity having been rectified. In this regard, the Committee considers that the author's complaint has no relation with the right guaranteed in paragraph 1 of article 15 of the Covenant. Consequently, this part of the complaint must be declared inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.7 In relation to the author's complaint concerning article 14, paragraph 5, although in his document dated 8 June 2001 the author states that his application for reconsideration of the judgement (*casación*) against him for trafficking in hashish was dismissed, the Committee notes that both in the supplement to his initial communication and in his comments on the observations by the State party, he confines himself to claiming that the violation of the article in question consisted of a refusal by the Constitutional Court to interrupt the judicial review proceedings (*casación*) he had initiated. The mere suspension of an ongoing proceeding cannot be considered, in the Committee's opinion, to be within the scope of the right protected in paragraph 5 of article 14 of the Covenant, which only refers to the right to a revision by a higher tribunal. Consequently, this part of the complaint must be declared inadmissible *ratione materiae* under article 3 of the Optional Protocol.

7. Consequently, the Committee decides:

(a) That the communication is inadmissible under articles 3 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author of the communication.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The arrest warrant did not comply with article 309.10 of the Italian Code of Penal Procedure, as the public prosecutor had not authorized phone-tapping.

[2] The author refers to the hearing provided for in article 12 of the Spanish Extradition Act: "*The court shall invite the person to indicate whether he or she consents to the extradition or intends to contest it, and to provide reasons therefor*".

[3] The author contends that he did so because he had learned of the Committee's decision in the *Gómez Vásquez* case.

N. Communication No. 972/2001, *Kazantzis v. Cyprus**
(Decision adopted on 7 August 2003, seventy-eighth session)

Submitted by:	George Kazantzis (represented by counsel, Mr. Sotiris Drakos)
Alleged victim:	The author
State party:	Cyprus
Date of communication:	23 February 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 August 2003,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 3 March 1998, is Mr. George Kazantzis. He claims to be a victim of violations by the Republic of Cyprus of articles 2, 14, 17, 25 and 26 of the Covenant. He is represented by counsel.

The facts as presented

2.1 On 23 June 1997, the Supreme Council of Judicature invited applications from qualified advocates for two vacancies of the post of District Judge and one vacancy of the post of Judge of the Industrial Disputes Tribunal. The author applied for both posts on 30 July 1997. He was interviewed by the Supreme Council of Judicature for both posts on 9 September and 11 September 1997, respectively.

2.2 On 18 September 1997, the Supreme Council of Judicature decided that a candidate other than the author was most suitable for the post of Judge of the Industrial Disputes Tribunal. The Council also ascertained that there were four additional vacancies for the post of District Judge, in addition to the two vacancies in relation to which applications had already been invited. It decided not to fill two vacancies at the time, but rather to invite also applications for the four additional vacancies. It was decided that, concerning the four additional vacancies, candidates who had already submitted applications for the two vacant posts would be considered for all six vacancies. On 15 and 18 October 1997, all candidates, including the author, were interviewed.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.3 On 21 October 1997, the Council evaluated the candidates, taking into account the reports on the abilities of each, by the President of the District Court in which the candidate was practising as a lawyer, and decided to appoint the six candidates considered the most suitable for the post of District Judge. The author was not among those selected for appointment. Notice of the appointments decided by the Council was published in the Official Gazette of the Republic on 14 November 1997. The author was not personally notified of his non-appointment, nor the reasons therefor.

2.4 The author did not contest this issue before the local courts, as previous jurisprudence of the Supreme Court had held that no Cypriot court had jurisdiction over the decisions of the Supreme Council of Judicature. In *Kourris v. Supreme Council of Judicature*,[1] the Supreme Court held, by a majority of three judges to two, that "… it follows that the Court has no jurisdiction to entertain a recourse … against any act, decision or omission of the said Council (of Judicature) because the functions of such Council *are very closely connected with the exercise of judicial power*". (Emphasis original.)

The complaint

3.1 The author claims that his non-appointment to a post of District Judge and the appointment of a person less qualified violated his right to "access, on general terms of equality, to public service", invoking article 25 of the Covenant, and, additionally, articles 17 and 26. The author alleged that he was properly qualified for the post of District Judge. He claims to have been afforded a two-minute interview, that the appointment of another applicant was based on grounds other than the actual interview.[2]

3.2 The author further contends that he has been deprived of his right of access to court and to a fair trial in respect of his non-appointment, in violation of articles 2 and 14 of the Covenant.

The State party's submission on the admissibility and the merits of the communication

4.1 By submission of 2 July 2002, the State party argues that the communication is (i) inadmissible for failure to exhaust domestic remedies, (ii) inadmissible with regard to articles 17, 25 (c) and 26, for failure to sufficiently substantiate the claims, and (iii) inadmissible *ratione materiae* with respect to article 14. It also submits on the merits that there is no violation of any of the articles of the Covenant invoked.

4.2 As to the issue of exhaustion of domestic remedies, the State party points out that by virtue of article 157 of the Constitution, "the appointment, promotion, transfer, termination of appointment, dismissal and disciplinary matters of judicial officers, are exclusively within the competence of the Supreme Council of Judicature". Since 1964, the Supreme Council of Judicature is constituted by all judges of the Supreme Court. Under article 146 of the Constitution, the Supreme Court may consider a challenge by an adversely-affected individual to the legality of "decisions, acts, or omissions, of organs, authorities, or persons exercising executive or administrative authority", if brought within 75 days of the date of publication of the decision. The Court may, inter alia, declare that the impugned decision is wholly or partly null and void.

4.3 The State party observes that in the *Kourris* case relied on by the author, a judicial officer holding the post of District Judge sought a declaration under article 146 of the Constitution that a decision of the Supreme Council of Judicature to promote other Judges instead of the applicant to the post of Acting President of the District Courts was null and void. The Court relied on the fact that the remedy afforded by article 146 related to matters within the province of the administration and not within the province of the judiciary, and was not therefore available in respect of the matters complained of by the applicant, as these were the province of the judiciary and emanated from an organ, the Supreme Court of Judicature, which was an organ within the judicial, rather than administrative, structure of the State. The Court held that, although the function of the Supreme Council of Judicature could not be described as "judicial" in the strict sense because it did not involve litigation, in view of the essential nature of its function which was so closely connected with the exercise of the judicial power, no recourse was available under article 146 against any decision of the Council in the exercise of its article 157 powers.

4.4 In the light of this judgement and of a further 2001 Supreme Court decision in the case of *Karatsis v. Supreme Council of Judicature*, the State party contends that the issue of the Supreme Court's jurisdiction to adjudicate future applications made to it for annulment of decisions of the Supreme Council of Judicature has not been determined in perpetuity. The State party contends that both the above judgements were issued at first instance and were not tested on appeal, and that the judgement in *Kourris* was a majority decision. It thus argues that had the author actually filed such an application, he would have had the opportunity to reargue and re-examine the matter of jurisdiction by the Court. In the State party's view, a judgement can only be said to have the effect of depriving a particular individual from having access to Court concerning a specific grievance if it has been issued in his own case.

4.5 The State party argues that further remedies are available to the author. The *Kourris* court itself pointed out that "even though an aggrieved judicial officer in the position of the present applicant does not possess a right of recourse under article 146.1, there exists in a proper case, the possibility of having his complaint examined by the Supreme Council of Judicature, because the Council, like any other collective organ, has the right to review, if necessary, its own decisions". The author has made no such application.

4.6 The State party also argues, with reference to Supreme Court jurisprudence, that the author could have instituted a civil action before the District Courts arguing a violation of Part II of the Constitution. Article 15 protects the right to privacy and family life, article 30 the right of access to court and article 28 equality before the law and non-discrimination. The author's claims with respect to articles 17, 14 and 26 respectively are thus guaranteed and protected through effective remedies available under domestic law.

4.7 The State party argues that these remedies are available to the author and are effective. Mere doubts as to their utility cannot absolve an author from exhausting available domestic remedies. Thus, the communication is inadmissible for failure to exhaust domestic remedies under article 5, paragraph 2 (b), of the Covenant.

4.8 The State party argues that the author's claims relating articles 17, 25 (c) and 26 of the Covenant have not been substantiated in any way and are accordingly inadmissible under article 2 of the Optional Protocol. The State party refers to the Committee's jurisprudence that article 25 (c) does not entitle every citizen to obtain guaranteed employment in the public service, but rather to access public service on general terms of equality.[3] There is no evidence before the Committee sustaining any violation of this right of equal access. As to article 26, the State party points out that not all differences in treatment are discriminatory; rather, differentiations based on reasonable and objective criteria do not amount to prohibited discrimination within the meaning of this article.

4.9 Finally, the State party argues that the author's claim under article 14, paragraph 1, is inadmissible *ratione materiae* with the Covenant, as the author's dispute with the State does not concern a matter, whose determination in a suit at law falls within the scope of article 14, paragraph 1, of the Covenant. In view of the close similarity with article 6, paragraph 1, of the European Convention on Human Rights, the State party points to the jurisprudence of the European organs that article 6, paragraph 1, of the European Convention does not extend to confer right of access to court concerning disputes as to appointment to certain branches of the public service, including the judiciary. In 1983, the European Commission of Human Rights held that disputes over appointment, promotion, dismissal concerning the judiciary are matters outside the scope of article 6, paragraph 1, of the Convention.[4] In 1999, the European Court of Human Rights, considering that there was some uncertainty as to the scope of article 6, paragraph 1, of the European Convention on Human Rights concerning disputes as to appointment, promotion and dismissal from the public service, held that the criterion to be adopted by the Court should be a functional one, based on the nature of the duties and responsibilities involved in the relevant post.[5] The Court considered that, in each case, it must be ascertained whether the "post entails - in the light of the nature and the duties and responsibilities appertaining to it - direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities". The judiciary falls squarely within this category, and challenges such as the author's are thus beyond the scope of article 6, paragraph 1.

4.10 As to the merits, the State party argues that the above observations disclose that there is no violation of any of the Covenant rights invoked.

The author's comments on the State party's submissions

5.1 By letter of 27 March 2003, the author rejects the State party's submissions. As to an action under article 146 of the Constitution, it would be unrealistic and violate the principle of judicial independence for the Supreme Court to challenge a decision which all its members, sitting together as the Supreme Council of Judicature, had reached. Such a remedy would therefore be ineffective and need not be exhausted. Moreover, the *Kourris* decision undersigned by five judges of the Supreme Court established a precedent binding all courts, including the District Courts as well as the first instance jurisdiction of the Supreme Court under article 146, and thus the outcome of any such petition made by the applicant to the Supreme Court would be a foregone conclusion. The author argues that, contrary to the State party's submission, *Kourris* was an appellate decision, and that he would have had to wait until his case reached an equivalent appellate level before a different decision from that reached in *Kourris* even became theoretically possible.

5.2 On the merits, he alleges that his application to the Supreme Council of Judicature was not considered on an equal basis with other applicants and that the main basis for appointments in Cyprus is what he calls nepotism. There are no adequate rules governing these issues, much less criteria or regulations or standards established by the Supreme Council of Judicature covering the appointment or promotion of Judges, who are appointed solely on time of tenure of practice irrespective of qualifications or suitability. The author did not receive any communication from the Supreme Council of Judicature on the reasons for his non-appointment. Under such circumstances, he considers himself deprived of the right or the opportunity to have access on general terms of equality to public service in his country.

5.3 The author argues that the State party has failed to guarantee his right to be equal before the law and/or to have an equal and effective protection against discrimination, especially on the basis of social origin. He thus considers his claims to be substantiated.

5.4 Finally, the author points out that the rights guaranteed by article 25 (c) and 26 of the Covenant are not guaranteed by the European Convention of Human Rights, and thus the decisions of the European organs offer no guidance on these points. In the author's view, once there is a right guaranteed by the Covenant and that there is no avenue of domestic recourse, the claim must be admitted.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 As to the issue of exhaustion of domestic remedies, the Committee observes that the *Kourris* judgement of the Supreme Court was a binding precedent to the effect the Supreme Council of Judicature's exercise of powers under article 157 of the Constitution are not susceptible to challenge before judicial fora. In the Committee's view, the State party has not shown that there is any likelihood that the Supreme Court would come to any other decision if the question were again to arise before it, and thus the remedy invoked by the State party must be regarded, on the basis of settled jurisprudence, as not being effective. Likewise, a District Court would be similarly bound by the Supreme Court's precedent. As to the possibility of review by the Supreme Council of Judicature on its own decision, the Committee recalls that it does not generally require, without more, an author to re-petition a body that has already pronounced itself in his or her case. The State party having advanced no reasons as to why the author may reasonably expect the Supreme Council of Judicature to come to another conclusion if the author again applied to it, the Committee is not able to conclude that this proposed remedy would be effective, for the purposes of article 5, paragraph 2 (b), of the Optional Protocol. As a result, the Committee considers it is not precluded from considering the communication by the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 As to the author's claims of a violation of articles 17, 25 and 26 of the Covenant, the Committee notes that the author claims that his application had been treated unequally, with a person less qualified than the author being appointed by the Supreme Council of Judicature to the post of District judge. The Committee notes that article 25 (c) of the Covenant confers a right of access, on general terms of equality, to public service, and thus, in principle, the claim falls within the scope of this provision in this respect. The Committee observes, however, that the author has provided no details as to the reasons the successful judge was appointed beyond a general allegation of nepotism, as to why his candidacy was superior in relevant respects or to any of the further matters which the Committee would be required to consider before it could resolve such a claim. Accordingly, the Committee considers that the author has failed to substantiate his claims under these articles for purposes of admissibility, and that they are inadmissible under article 2 of the Optional Protocol.

6.5 As to the author's claim under article 14, paragraph 1, the Committee observes that, in contrast to the situation in *Casanovas v. France*[6] and *Chira Vargas v. Peru*[7] concerning removal from public employment, the issue in dispute concerns the denial by a body exercising a non-judicial task of an application for employment in the judiciary. The Committee recalls that the concept of "suit at law" under article 14, paragraph 1, is based on the nature of the right in question rather than the status of one of the parties.[8] It considers that the procedure of appointing judges, albeit subject to the right in article 25 (c) to access to public service on general terms of equality as well as the right in article 2, paragraph 3, to an effective remedy, does not additionally come within the purview of a determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, of the Covenant. This part of the communication is therefore inadmissible *ratione materiae*, under article 3 of the Optional Protocol.

6.6 The author has invoked article 2 of the Covenant together with articles 17, 25 (c) and 26. This raises the question as to whether the fact that the author had no possibility to challenge his non-appointment as a judge amounted to a violation of the right to an effective remedy as provided for by article 2, paragraphs 3 (a) and (b), of the Covenant. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States parties must ensure that individuals also have accessible, effective and enforceable remedies to vindicate those rights. The Committee recalls that article 2 can only be invoked by individuals in conjunction with other articles of the Covenant,[9] and observes that article 2, paragraph 3 (a), stipulates that each State party undertakes "to ensure that any person whose rights or freedoms are violated shall have an effective remedy". A literal reading of this provision seems to require that an actual breach of one of the guarantees of the Covenant be formally established as a necessary prerequisite to obtain remedies such as reparation or rehabilitation. However, article 2, paragraph 3 (b), obliges States parties to ensure determination of the right to such remedy by a competent judicial, administrative or legislative authority, a guarantee which would be void if it were not available where a violation had not yet been established. While a State party cannot be reasonably required, on the basis of article 2, paragraph 3 (b), to make such procedures available no matter how unmeritorious such claims may be, article 2, paragraph 3, provides protection to alleged victims if their claims are sufficiently well-founded to be arguable under the Covenant. Considering that the author of the present communication has failed to substantiate, for purposes of admissibility, his claims under articles 17, 25 and 26, his allegation of a violation of article 2 of the Covenant is also inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] (1972) 3 CLR 390.

[2] *Note to the Committee*: The author does not specify what the alleged "other" grounds of appointment were or what issues were canvassed in the interview.

[3] The State party refers to *Kall v. Poland* Case No. 552/1993, Views adopted on 14 July 1997.

[4] *X v. Portugal* (1983) 32 DR 258.

[5] *Pellegrin v. France* Application 28541/1995; judgement of 8 December 1999.

[6] Case No. 441/1990, Views adopted on 19 July 1994.

[7] Case No. 906/2000, Views adopted on 22 July 2002.

[8] *Y.L. v. Canada* Case No. 112/81, Decision adopted on 8 April 1986, at paragraph 9.2; and *Casanovas v. France*, op. cit, at paragraph 5.2.

[9] *S.E. v. Argentina* Case No. 275/88, Decision adopted on 26 March 1990, at paragraph 5.3.

O. Communication No. 978/2001, *Dixit v. Australia**
(Decision adopted on 18 March 2003, seventy-seventh session)

Submitted by:	Sunil Dixit
Alleged victim:	Sonum Dixit (his daughter)
State party:	Australia
Date of communication:	18 May 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 18 May 1998, is Mr. Sunil Dixit, a resident of the United States at the time of submission of his communication. He claims that his daughter, Sonum Dixit, who was 7 years old at the time of submission, is a victim of a violation by Australia of article 2, paragraph 3, article 14, paragraph 1, article 17, article 24 and article 26 of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

The facts as submitted by the author

2.1 In the course of 1996, the author, a certified public accountant, applied from the United States, as primary applicant, for an Australian migrant visa covering himself, his wife Shivi and daughter Sonum. On 16 September 1997, the visas were denied to all three applicants by the Department of Immigration and Multicultural Affairs (hereafter DIMA) under the Migration Act 1958. The grounds given were that Sonum, who had been born on 3 October 1991, suffered from a mild case of *spina bifida*, "a disease or condition that would be likely to result in significant cost to the Australian community in the areas of health care and community services".

2.2 This conclusion was reached following an assessment by the Commonwealth Medical Officer of a specialist paediatrician's report supplied by the author. The report concluded that the child's *spina bifida*, "with several complications", would result in "significant costs to the Australian community", inter alia, through further orthopaedic surgery, regular attendance at specialist clinics and likely long-term dependence upon income support.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 Following the denial of the application, the author supplied further medical information, although there is no right to a formal review of the medical opinion underlying the decision to deny the applications. The Minister of Immigration responded that, upon analysis of the further information, even upon the most optimistic of predictions Sonum's costs to the community would be significant (defined as $A 16,000 over the next five years or longer if foreseeable). This was based upon costs associated with close supervision by a multidisciplinary team, repeated investigations over her lifetime and foot surgery, as well as disability allowances of $A 1,950 a year until she reached 16 years of age. This assessment was made without regard as to whether the person would effectively use those services.

2.4 Thereafter, the author made a variety of professional complaints against the medical specialists involved, and made approaches to a variety of Ministers and officials, without success. Complaints made to the Ombudsman, the Human Rights and Equal Opportunity Commission (hereafter HREOC) (dismissed for want of jurisdiction), the Parliamentary Joint Standing Committee on Migration, the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade (Human Rights Sub-Committee) were of no avail.

2.5 During the year 2000, the author and his family filed a new application for Australian Migrant Visa Sub-class 136, which is a different class of visa to the one for which the author's family initially applied. This visa was granted on 18 May 2000 and the author's family is since then entitled to lawful permanent residence of Australia. As a result, the author informed the Committee on 4 June 2001 that he was willing to withdraw his communication if the State party's Government confirmed that the commencement of their status as permanent residents is pre-dated to 1997 - when the first application for Migrant Visa was denied - instead of 2000 and waived the residency requirement for his family so that they can file applications for Australian citizenship.

The complaint

3.1 The author challenges the factual and evidential bases for the medical evaluations made, the author's central complaint is that the decision to refuse the applications for visa violates the guarantee to equality before the law, stipulated in article 26 of the Covenant, in that the decision discriminated upon the grounds of disability. Essentially, the author attacks the specific health criteria contained in the Migration Act 1958 and associated regulations, which are stated as seeking to minimize risks to public health and community services, to limit public expenditure on health and community services, and to maintain the access of Australian citizens and permanent residents to those services under which the decision to refuse the applications was made. The author points out that section 52 of the Disability Discrimination Act 1952, which proscribes discrimination upon the basis of disability, specifically excludes that Act from applying to discriminatory provisions of the Migration Act 1958.

3.2 Also with respect to article 26 of the Covenant, the author alleges that all persons are not equal before the law, as he was not given a right to review or appeal the decision made by DIMA whereas there are categories of visa for which applicants have a full right of review or appeal.

3.3 The author alleges that article 26 of the Covenant was further violated in that his daughter suffered discrimination because the Medical Officer who made the health assessment did not have the appropriate medical specialization in *spina bifida*.

3.4 The author finally alleges a violation of article 26 in that he was unable to seek a possible waiver of the health requirements because he was unable to satisfy the apparently necessary statutory precondition of having a relative in Australia. The author contends that this requirement to have Australian relatives before a waiver can be considered breaches the equal protection of the law.

3.5 The author alleges a violation of article 2, paragraph 3 and article 14, paragraph 1 of the Covenant, as his right to access to judicial process for a determination of his rights is violated because in his case, in contrast to the situation under other types of migrant visas, there allegedly is no right to review or appeal of the refusing decision to the Immigration Review Tribunal or the Federal Court. The author however stated on 18 May 1998 that there was a form of appeal possible to the State party's Federal Court within four months of the decision, but that due to delays in obtaining the documents of his case the time limits had passed. In any event, the author contends that it is very difficult and weighted against a litigant for court action in Australia to be pursued from abroad.

3.6 The author further contends that his due process rights protected under article 14, paragraph 1, require an opportunity to be given to supply more medical information in such cases, to consult external specialists on the medical findings and to have the medical findings subject to review by an independent medical panel. In this regard, the author alleges that his complaint before the HREOC was a "suit at law" but that he "was not given opportunity to have [his] claim determined by a judicial body as guaranteed by" article 14, paragraph 1 of the Covenant.

3.7 The author finally alleges a violation of articles 17 and 24 because his daughter has allegedly been falsely declared eligible for "Child Disability Allowance", which constitutes an unlawful attack on the reputation of a minor child and demonstrates that his daughter did not enjoy the protections guaranteed by article 24 of the Covenant.

The State party's observations on the admissibility and merits of the communication

4.1 By submissions of 20 December 2001, the State party made its observations on the admissibility of the communication.

On admissibility

4.2 The State party first submits that the communication is inadmissible because, at the time when it was submitted to the Committee, the author, his wife and daughter, were neither on Australia's territory nor under its jurisdiction as required by article 2, paragraph 1, of the Covenant. Although the State party accepts that in some cases, a liberal interpretation should be given to the above-mentioned provision, citing the jurisprudence of the Committee in *Lichtensztejn v. Uruguay*[1] and *Vidal Martins v. Uruguay*,[2] the author's communication may be distinguished from these cases since he and his family were nationals of another State applying to migrate to Australia. They had no previous connection with Australia and, referring to general comment No. 15 of the Committee,[3] they had no right under international law to reside permanently in Australia. The State party stresses that, according to the *travaux préparatoires* of the Covenant, the insertion of the dual requirement that a person be both in the territory and subject to the jurisdiction of the State was quite deliberate and to suggest that the Covenant might apply to non-citizens, residing in another country, whose only connection with Australia is an application for a particular class of visa, is to extend the scope of the Covenant far beyond the intention of the drafters and would render the wording of article 2, paragraph 1, redundant.

4.3 The State party further submits that the author has not exhausted domestic remedies because, contrary to his allegation that he was not given a right to appeal the decision of the DIMA, there were two separate avenues of judicial review available to the author. The first was a right to seek a judicial review of the decision in front of the Federal Court according to section 475 of the Migration Act then in force within 28 days of the notification of the decision, and the second was a right to seek a remedy in the High Court against a decision taken by Commonwealth officers according to section 75 of the State party's Constitution. The State party argues that both courts could have given an impartial, timely, public and judicial hearing of the complainants' legal arguments. It is further submitted that both courts are readily accessible and that there are no undue delays for having a hearing before these courts. As the author had already obtained the assistance of a counsel in Australia, it would have been routine matter for the latter to ensure that such applications are made.

4.4 The State party also submits that the alleged victim of the case is not a victim in the sense of article 1 of the Optional Protocol, because the author, his wife and daughter were granted an Australian permanent entry visa on 18 May 2000, although on a different class of visa, noting that the author's daughter was cleared by the Health Assessment Services on 9 May 2000 on the basis of a further assessment of her condition and further medical documentation. The State party holds that a person who has substantially obtained the benefit claimed can no longer be a victim in the sense of article 1 of the Optional Protocol. Referring to the jurisprudence of the Committee and that of the European human rights institutions in this respect and the reasons lying behind the principle of exhaustion of domestic remedies, it is submitted that the provision of a remedy by the State party constitutes an obstacle to the international claim given the subsidiary role of the international mechanism. The State party considers that standing provisions should be interpreted strictly and recalls that the Committee stated previously that it was not intended to be a vehicle for debate on public policy.[4] The State party is also of the opinion that the implied threat contained in the author's submission of 4 June 2001 raises doubt about the sincerity of and motivation for his claim.

4.5 Finally, the State party argues that the author has failed to substantiate his claims under the Covenant in order to make a prima facie case. The arguments supporting this ground of inadmissibility are developed together with the observations by the State party on the merits of each of the claims.

4.6 For the above reasons, the State party considers that the communication should be declared inadmissible.

On the merits

4.7 With respect to the alleged violation of article 2, paragraph 3, of the Covenant in that the State party failed to provide a local remedy in accordance with article 2 (3) of the Covenant, the State party underlines that the rights referred to in article 2 of the Covenant are accessory in nature and linked to the other rights set forth in the Covenant and, referring to a number of decisions taken previously by the Committee, that a violation of this provision can only be found once a violation of another right has been established. Therefore, if, as the State party submits, there is no violation of another provision of the Covenant, the claim under article 2, paragraph 3 should be considered as unsubstantiated.

4.8 With respect to the alleged violation of article 14 of the Covenant, the State party first contends that a complaint made to the HREOC is not a "suit at law" as the HREOC is not a judicial body. Moreover, the author could have taken legal proceedings if he was not satisfied with the HREOC decision. The State party further argues that if the author's claim is that the substance of the complaint to HREOC is a "suit at law" therefore alleging a violation of article 14 because of the lack of judicial review from the decision not to grant a visa, article 14, paragraph 1 does not provide for a right to review per se, similarly to the right contained in article 14, paragraph 5, that relates only to criminal conviction and sentence. The State party considers therefore that the author has not raised an issue under the Covenant and that this claim should be declared inadmissible.

4.9 With respect to the alleged violation of article 17 of the Covenant, the State party submits that a violation of the said provision implies an "attack", which must be of a certain intensity, its "unlawful" character, that is in violation of a domestic legal provision, and must be made with the intention to impair a person's honour and reputation. In relation to the admissibility of this claim, it is submitted that the author has not substantiated the existence of these three elements. In relation to the merits of this claim, the State party contends that the statement made on the health of the author's daughter was entirely reasonable and based on the specialist medical reports on which the author himself relies. The comment is not unlawful as it was neither gratuitous nor extreme and therefore could not constitute an attack in the sense of article 17. The statement made on the basis of three concurring medical reports that the author's daughter was eligible for Child Disability Allowance is fair and thus not aimed at intentionally injuring the person's reputation or honour.

4.10 With respect to the alleged violation of article 24 of the Covenant, the State party submits that the author failed to demonstrate the existence of any measures of protection that could have been taken by Australia and that it failed to fulfil. An interpretation of article 24, paragraph 1 of the Covenant according to which a State party would be prohibited from assessing children according to visa criteria and drawing conclusions in appropriate cases that those children would be eligible for an allowance would be absurd.

4.11 With respect to the alleged violation of article 26 of the Covenant, in that the process of the Independent Visa Sub-class 126, for which the author applied initially is discriminatory vis-à-vis the other visa processes because of its requirement of health assessment and its lack of right of review, the State party, referring to the jurisprudence of the Committee,[5] submits that, for the purposes of the Covenant, differentiation based on reasonable and objective criteria and whose aim is a legitimate purpose under the Covenant do not constitute discrimination. In relation to the admissibility of this claim, it is submitted that the author has not made general submissions on the difference in visa classes or on the public interest *criterion* of the health assessment, has not demonstrated that the different conditions related to visa classes are based on disability and has not indicated that such difference is unreasonable. In relation to the merits of this claim, the State party explains that the Independent Visa Sub-class 126 is aimed at allowing immigration of people whose particular skills and qualifications are likely to bring a net economic benefit to Australia and that, for such a purpose, it is a reasonable requirement for applicants to ensure that they are not likely to impose significant health-care cost upon the Australian community, an assessment that is made on a case-by-case basis by competent medical officers.

4.12 With regard to the alleged violation of article 26 of the Covenant, in that the Independent Visa Sub-class 126 is discriminatory because it is exempt from the requirements of the Disability Discrimination Act, the State party emphasizes that all visa subclasses contain the same exemption and may be reviewed by either the Federal Court or the High Court, remedies that the author failed to apply for. Moreover, it is submitted that even in the absence of a possibility of judicial review there would still be no grounds for discrimination as the latter means treating like groups or individuals differently for no objective reasons whereas applicants of the different visa subclasses are not like groups. The existence of different types of visa subclasses does not constitute discrimination because it is legitimate and reasonable and based on objective criteria.

4.13 With respect to the alleged violation of the same article 26 of the Covenant, in that the discrimination suffered by the author's daughter partly arose from the fact that the officer making the health assessment did not have the appropriate medical specialization, the State party, analysing the three medical reports upon some of which the author also relied, submits that the officer's opinion paraphrases the specialist reports and does not differ in its conclusions.

Comments of the author

5.1 By submission of 14 and 15 March 2002, the author gave his comments on the State party's submission.

On admissibility

5.2 With respect to the allegation that the conditions of article 2, paragraph 1 of the Covenant are not fulfilled, the author states that the victim does not have to be physically within the territory of the State party in order to be subject to its jurisdiction. In the present case, the author and his daughter were subject to the jurisdiction of the State party by the operation of the Australian Migration Act. In some cases, the State party's laws operate with extraterritorial effect as for example in matters concerning travel to and entry into Australia, a State party's legislation subjecting people to its jurisdiction even though they may not be citizens or residents. In order to demonstrate the extent to which he and his daughter are subject to the Australian jurisdiction for the purpose of the visa, the author gives an extensive description of the visa system in Australia and especially of the Independent Visa Sub-class 126, which he describes as a complex legal framework. Thus where a person's rights and duties are subject to the State party's legislation, even if not physically present on its territory, he or she is subject to the jurisdiction of this State for the purpose of having those rights and duties determined. Any person trying to enter Australia must comply with the relevant State party's legislation. The author and his daughter were thus subject to the State party's jurisdiction because their application for visas was determined pursuant to the State party's legislation. The decision is made according to the State party's legislation and, as it is suggested by the State party, there are remedies under the State party's legislation. The author submits that this is sufficient to demonstrate that the author and his daughter were indeed subject to the jurisdiction of the State party at the relevant time.

5.3 With respect to the alleged failure to exhaust domestic remedies, the author submits that the remedies to which the State party is referring are remote, expensive, ineffective and likely to fail. The author also draws the attention of the Committee on the actions he has taken in relation to his visa application before lodging this communication, writing an important number of letters, requesting information and seeking assistance of various bodies, complaining to the HREOC, the Ombudsman and the Medical Board. Moreover, despite his extensive correspondence with DIMA and the Minister, the author was never advised of the existence of the remedies referred to by the State party. The author further submits that it has taken more than three years to be in possession of all the elements to understand why the visa had been rejected and that when he contacted lawyers in Australia, they were unable to help him as that information was unavailable. The author asked a counsel, Goldsmith Lawyers, to request copy of his file from DIMA but by the time he received the file, he realized that there was not enough information to make a determination of specific aspects of health assessment which led to denial of the visa. He thus requested the help of a Senator to find the facts, and it was not until 1999 that he was able to take action, outside the time limitation for bringing an action before the Federal Court. The author considers that this delay in obtaining the appropriate information cannot be attributed to him. Further, the author contends that he is not obliged to pursue a domestic remedy that does not offer a reasonable prospect of success. Having regard to the nature of the decision on visa application, the fact that he was residing in the United States, that he did not receive the reasons for the negative decision, that he was not eligible for legal aid in Australia, it would have been practically impossible to pursue legal proceedings in Australia before either the Federal Court or the High Court. The author also argues that judicial review is not intended to assess whether there has been a violation of human rights but whether there was a legal error and does not include a review of the substantive issue, which is what the author was concerned with. Those remedies would thus not have provided the author with any relief for the substantive issues. Finally, the author contends that there is no precedent where an offshore non-citizen has made an appeal before the High Court in relation to the refusal of a visa on health grounds and that the High Court, being mainly a court of last instance, does not encourage litigants to commence claims at this stage. The author is therefore of the opinion that he has exhausted all reasonable available domestic remedies.

5.4 With respect to the alleged absence of quality of victim, the author, referring to the jurisprudence of the Committee,[6] notes that the alleged victim of a communication does not have to remain a victim throughout the entire period of the procedure before the Committee. Moreover, the issuance of a visa to the author and his family in 2000 does not mean that they are no longer a victim in the sense of the Covenant as they continue to suffer the effects of the State party's violations of the Covenant. The fact that the visa was granted three years later than expected had some consequences on the situation of the family, including with regard to their application for Australian citizenship. The author further argues in this respect that had he and his family been granted a visa in 1997, their situation would have been much more favourable. In support of this allegation, the author makes a comparison between currency rates and explains the evolution of the market during the period 1997-2000. The author also submits that while it would have been easy for his daughter to move to Australia in 1997 when she started her education, it will now be much less easy for her to adapt herself to a new country because she started her education in a different system since three years. The author also firmly rejects the State party's contention that his letter of 4 June 2001 is an implied threat that raises doubts about the sincerity of and motivations for his claims.

5.5 With respect to the State party's argument that the claims developed in the communication are unsubstantiated, the author submits that he has provided a detailed account of the circumstances giving rise to the communication as well as the basis for the communication and the provision allegedly violated.

On the merits

5.6 With respect to the allegation that article 2, paragraph 3, of the Covenant provides no independent right that could make the object of a communication and that a violation of article 2 can only be found whenever the violation of another right of the Covenant has been established, the author submits that the existence of a remedy is critical to the effectiveness of the Covenant as the true enjoyment of the Covenant's rights ultimately depends on securing the existence of an effective remedy. Acknowledging that earlier Views of the Committee support the State party's opinion, the author emphasizes that this has not been always a unanimous view of the Committee members and that some members of the Committee have made clear that the Committee's jurisprudence may be reversed or modified and cannot be invoked as a ground per se for declaring a case inadmissible.

5.7 With respect to the alleged violation of article 14 of the Covenant, the author reiterates that there are no remedies under the State party's legislation to challenge the application of criteria excluding a person with a disability for being granted a visa and, in this case, to present evidence as to why his daughter would not have been a burden for the Australian health-care system.

5.8 With respect to the alleged violation of article 17, the author maintains that the failure of the State party authorities to have considered all relevant aspects of his daughter's condition constitute an unreasonable process that undermined her honour and reputation.

5.9 With respect to the alleged violation of article 24, the author contends that his daughter is entitled to be considered for a visa without discrimination on the basis of her disability.

5.10 With respect to the alleged violation of article 26, the author argues that, on matters relating to the consideration of a visa, people with a disability are, according to the Migration Act, not treated on an equal basis with people without the disability. Referring to the Committee's general comment No. 18, and although he agrees that not every differentiation is discriminatory if the differentiation is based on objective and reasonable criteria and is aimed at pursuing a legitimate purpose under the Covenant, the author considers that the differentiation made on the basis of the health criteria is not reasonable and objective and that it does not constitute a legitimate aim under the Covenant.

Additional comments by the State party

6.1 By submission of 19 September 2002, the State party made additional observations on the author's comments.

6.2 Regarding the issue of jurisdiction, the State party argues that the term "jurisdiction" means that the State has rights "to control or interfere with a particular person or object", that the issuing or refusal of a visa does not fall into that category and that the Australian migration law does therefore not confer any sovereign authority to the State party over the author.

6.3 Regarding the exhaustion of domestic remedies, the State party argues that the remedies to which it was earlier referring are not expensive as the fee for such applications could have been waived, that the presence of the author before the Federal Court or the High Court would not have been required, that the High Court could have allowed an application made outside the usual time limit if it was in the interests of justice, that it would not be appropriate for a Commonwealth Department such a DIMA to advise individuals of possible rights of judicial review, that, under the two remedies, the decision to refuse the visa could have been quashed and directed to be remade and that over 100 immigration cases have been made the object of an application to the High Court, including by offshore non-citizens.

6.4 Regarding the quality of victim, the State party draws the attention of the Committee to the fact that, despite the issuing of a visa for the author's family in 2000, the author did not move to Australia for financial reasons.

6.5 Finally, the State party notes, on the basis of the author's last submission, that the author's salary in the United States of America over the last year exceeds by 200 per cent the equivalent Australian salaries and that, for that reason, it appears that the author's family has decided to stay in the United States of America.

Author's additional comments

7. By submission of 8 October 2002, the author made additional comments on the State party's observations and reiterated that the processing of his family's visa was done under Australian laws and with physical boundaries of the Australian Diplomatic post. He also emphasized that the way the State party was admitting immigrants had to be in compliance with the Covenant. The author finally underlines that he had never been informed of the legal avenues that were open to him and does not believe that the High Court can effectively be used for initiating legal proceedings emerging from an allegedly fraudulent medical assessment.

Issues and proceedings

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.

8.3 The Committee observes that the author appears to accept that there was, in principle, a remedy available to his daughter in the State party's Federal Court. Although formal time limits now have expired, the Committee considers that the author has not demonstrated any effort to engage the State party's judicial remedies. Furthermore and in respect of the present time, the Committee observes that the author has not shown that an application for leave to appeal out of time would be unavailable and also observes that a later visa application has meanwhile proven successful. The communication is accordingly inadmissible under article 5, paragraph 2 (b).

9. The Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] See Case No. 77/1980, Views adopted on 31 March 1983.

[2] See Case No. 57/1979, Views adopted on 23 March 1982.

[3] The State party quotes the first sentence of paragraph 5 of general comment No. 15: "The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory."

[4] See *E.W. et al. v. Netherlands*, Case No. 429/1990, Decision adopted on 8 April 1993.

[5] See *P.P.C. v. Netherlands*, Case No. 12/1986, Inadmissibility decision adopted on 24 March 1988 and *A.P.L. v. d. M. v. Netherlands*, Case No. 478/1991, Inadmissibility decision adopted on 26 July 1993.

[6] See *A. v. Australia*, Case No. 560/1993, Views adopted on 3 April 1997.

P. Communication No. 980/2001, *Hussain v. Mauritius** (Decision adopted on 18 March 2003, seventy-seventh session)

Submitted by:	Fazal Hussain
Alleged victim:	The author
State party:	Mauritius
Date of communication:	18 February 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 March 2002,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 18 February 1998, is Mr. Fazal Hussain, an Indian citizen currently serving a prison term in Mauritius. He claims to be a victim of a violation by Mauritius of article 14, paragraph 3 (b), (c) and (d), paragraph 5 and paragraph 6 of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

The facts as submitted by the author

2.1 On 7 July 1995, the author was arrested at Sir Seewoosagur Ramgoolam international airport in Mauritius and charged with "importation and trafficking" in heroin. Before 15 October 1996, the author was brought twice before the District Court of Mehbourgh.[1]

2.2 On 20 June 1996, the author appeared before the Supreme Court for his trial. After the Chief Justice had read out the charges against him, the author was confused as he was not assisted by counsel and did not understand English properly. He mentioned that he had applied for legal aid and that he wanted to be assisted by an interpreter. The Supreme Court adjourned the trial for these reasons.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Pursuant to rule 85 of the Committee's rules of procedure, Mr. Rajsoomer Lallah did not participate in the adoption of the decision.

2.3 In September 1996, the author personally contacted a lawyer, Mr. Oozeerally, who agreed to start working on the case as soon as he received the copies of the author's statement as well as of other evidence related to the case. Mr. Oozeerally was later appointed as legal aid counsel. The author claims that his counsel received the documents only five days before the trial.

2.4 The author was advised by his counsel to plead not guilty but after one day of proceedings, the author decided to plead guilty because he was "shocked to see the court proceedings and the way the trial was going on". On 17 October 1996, the author was sentenced to life imprisonment. He immediately indicated to the judge that he wanted to appeal.

2.5 On 29 October 1996, the author applied for legal aid for his appeal (*in forma pauperis*) but his request was turned down by the Chief Justice on the basis of his counsel's opinion who considered that there were no grounds for appeal.

The complaint[2]

3.1 The author first alleges that the prosecution had 14 months to prepare its case while his counsel received the necessary information to prepare his defence only five days prior to the trial. The author thus did not have sufficient time to prepare his case.

3.2 The author further alleges that he had been sentenced to life imprisonment by a court composed by a single judge and not by a jury, which is allegedly contrary to the Covenant.

3.3 Finally, the author alleges that he has been denied his right to appeal and legal aid to make such an appeal. He further claims that it is on the basis of his trial counsel's opinion that the application for his appeal *in forma pauperis* was denied.

The State party's observations on the admissibility and merits of the communication

4.1 By submissions of 13 August 2001 and 29 January 2002, the State party made its observations on the admissibility and merits of the communication.

4.2 With regard to the admissibility of the communication, the State party holds that the claim made by the author constitutes an abuse of the right of submission and that the author has failed to exhaust all available domestic remedies to the extent that, if it was his opinion that his constitutional rights of fair trial had been breached, he could have applied to the Supreme Court for redress. Moreover, the author was entitled to apply to the Commission on the Prerogative of Mercy for a review of the punishment imposed by the Supreme Court.

4.3 With regard to the merits of the case, the State party explains that, at the first hearing on 20 June 1996, the author's trial was postponed so that he could be legally represented and assisted by an interpreter. It appeared later that, although proceedings were translated in his mother tongue, as a matter of fairness, the author was conversant in English and that he had no objections that proceedings be conducted in this language.

4.4 The State party further contends that at no time during the trial did counsel ask for an adjournment on the grounds that he needed more time for preparing the case, which, according to the practice in such cases, would have been granted by the court.

4.5 Moreover, although counsel stated at some stage that a statement by a witness and some photographs were not communicated to him, he made clear that he was not making any objection to the admissibility of most documents brought by the prosecution. Counsel further stated that he did not need time to look at the documents as they were read out in court. Finally, the witnesses who recorded the statement and took photographs were also heard in court and could have been cross-examined by counsel.

4.6 Concerning the right to appeal, the State party's legislation provides for legal aid at the stage of appeal. According to the procedure in such cases, the file is sent to a barrister to see whether there are reasonable grounds to appeal a decision. In the present case, on 17 October 1996, the author gave notice to the judge of his intention to appeal the court's decision. The relevant documents were thus sent to counsel who, on 5 November 1996, wrote an opinion stating that there were no reasonable grounds to make such an appeal. The author was informed of the latter by the Commissioner of Prisons and his request for legal aid was accordingly rejected.

4.7 The State party is of the opinion that due consideration was given to the author's application for legal aid, but that on the basis of his own counsel's advice, the court had no other option but to reject his request. The State party explains that it is a settled matter of its courts to reject applications for legal aid in appeal cases that are deemed frivolous and vexatious. Furthermore, the author could have appealed directly to the Supreme Court, which he chose not to do in the circumstances.

Comments of the author

5.1 By submission of 7 March 2002, the author gave his comments on the State party's submissions.

5.2 With regard to the merits of the case,[3] the author reiterates that his counsel was not given sufficient time to prepare his defence and refers to a document submitted by the State party where counsel mentioned that the brief was submitted to him only a few days prior to the trial. In this regard, the author states that he is not in a position to ask his counsel why he did not ask for the adjournment or postponement of the trial.

5.3 The author also maintains his claim that he was denied his right to appeal and states that he had never asked for his first instance's counsel to take care of the appeal. The author considers that a different counsel should have been appointed for the appeal procedure. The author further states that he has never been informed of his counsel's opinion that there were no reasonable grounds to appeal the Supreme Court's decision.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.

6.3 Concerning the author's claim that his counsel has not received sufficient time to prepare his defence because the case file was transmitted to him only five days prior to the first hearing, which may raise issue under article 14, paragraph 3 (b) and (d), of the Covenant, the Committee notes from the information brought by both parties that counsel had the opportunity to cross-examine the witness as well as to ask for the adjournment of the trial, which he did not do. In this respect, the Committee refers to its jurisprudence that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.[4] In the instant case, there is no reason for the Committee to believe that the author's counsel was not using other than his best judgement. Moreover, the Committee notes that the author eventually decided to plead guilty against the advice of his counsel. The Committee finds therefore that the author has not sufficiently substantiated his claim under article 14, paragraph 3 (b) and (d) of the Covenant. This part of the communication should therefore be declared inadmissible under article 2 of the Optional Protocol.

6.4 Concerning the author's claim that he was not tried by a jury but by a single judge, the author has not demonstrated how this could constitute a breach of the Covenant. This part of the communication should therefore be declared inadmissible under article 3 of the Optional Protocol.

6.5 Concerning the author's claim of a violation under article 14, paragraph 3 (c), the Committee considers that the author has not sufficiently substantiated, in the circumstances of his case, how a period of 11 months between his arrest and the first hearing by the Supreme Court could constitute a violation of article 14, paragraph 3 (c). This part of the communication should therefore be declared inadmissible under article 2 of the Optional Protocol.

6.6 Concerning the author's claim of a violation under article 14, paragraph 6, the Committee notes that the author has not brought before it any element that could raise an issue under these provisions. This part of the communication should therefore be declared inadmissible under article 3 of the Optional Protocol.

6.7 Concerning the author's claim that he has been denied his right to appeal, which may raise an issue under article 14, paragraph 3 (d) and paragraph 5, the Committee, bearing in mind that he pleaded guilty against the advice of his counsel, notes that the author sought legal aid for his appeal without presenting any grounds or supporting reasons for the appeal, and that after his request for legal aid was denied, he failed to apply to the Supreme Court for violation of his constitutional rights. The Committee is of the opinion that the communication is inadmissible for failure to exhaust domestic remedies under article 5, paragraph 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2, 3 and 5 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The author does not give any indication whether anything relevant for the case was raised at the District court level.

[2] The author makes a general allegation of a violation of article 14, paragraph 3 (b), (c) and (d), paragraph 5 and paragraph 6 of the Covenant and does not make a legal distinction between his claims.

[3] The author does not raise any arguments related to the fact that he has not applied to the Supreme Court for violation of his constitutional rights.

[4] See inter alia, the Committee's decision in Communication No. 536/1993, *Perera v. Australia*, declared inadmissible on 28 March 1995.

Q. Communication No. 984/2001, *Shukuru Juma v. Australia** (Decision adopted on 28 July 2003, seventy-eighth session)

Submitted by:	Shukuru Juma
Alleged victim:	The author
State party:	Australia
Date of communication:	19 February 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 July 2002,

Adopts the following:

Decision on admissibility

1. The author of the communication is Shukuru Juma, an Australian citizen born in Tanzania, currently serving a sentence of life imprisonment at Wolston Correctional Centre, Queensland, Australia. He claims to be a victim of violations by Australia of article 14, paragraphs 3 (f) and 5, of the International Covenant on Civil and Political Rights. He is not represented by counsel.

The facts as submitted by the author

2.1 On 2 February 1997, the author was arrested and brought to Dutton Police Station where he was charged with murder. On 25 November 1998, he was convicted of murder and on 26 November 1998 sentenced to life imprisonment. He appealed against his conviction and applied for an extension of time for the filing of the appeal to the Court of Appeal. Both his appeal and request for an extension of time were dismissed on 16 July 1999. The author then sought special leave to appeal from the High Court of Australia. On 24 November 2000, the High Court dismissed his application.

2.2 From the time of his arrest to the final appeal of his case the author was not provided with interpretation facilities, despite his requests for an interpreter at each stage of the proceedings. He claims that he requested the assistance of an interpreter prior to the interview with the police, and that he requested interpretation from his lawyer during the trial at first instance. During the Court of Appeal hearing, the author was provided access to an interpreter to conduct interpretation by telephone conference. However, the author refused this facility as the interpreter was not in the courtroom and he believed that he could not trust him/her. He states that he refused to talk to the interpreter, as "the police had forced me against my will to give a record of interview and I was assaulted by … [a Detective] of the Queensland police".[1]

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Pursuant to rule 85 of the Committee's rules of procedure, Mr. Ivan Shearer did not participate in the adoption of the decision.

2.3 In his application for special leave to appeal to the High Court, the author alleged that he was "forced" to accept a legal aid lawyer who was only assigned to his case on the morning of the appeal, and was, therefore, unfamiliar with it. In addition, the lawyer refused to refer to the points of law raised in the application prepared by the author. Also during the hearing, the author alleges that one of the judges asked on three occasions where the interpreter was but his counsel merely responded that he knew the case.

The complaint

3.1 The author claims that the State party has violated his right to a "fair and unbiased trial". In particular, he claims that, as his first language is Swahili and English only his fourth language, he was unable to understand what was taking place during the court hearings and unable to understand the complexities of the legal process. He argues that because he did not understand what was being said during the proceedings, he agreed with the questions posed. He claims that because he did not have the assistance of an interpreter, the State party violated article 14, paragraph 3 (f), of the Covenant.

3.2 The author also claims that the State party violated article 14, paragraph 5, of the Covenant, but does not explain further how he considers his rights in this regard to have been violated.

The State party's submission on the admissibility and merits of the communication

4.1 By note verbale of 21 December 2001, the State party comments on the admissibility and merits of the communication. It provides the following version of the facts, from the author's arrest to his appeal. The author was born in Tanzania, and arrived in Australia in 1989. His first language is Swahili.

Pre-trial detention and interview

4.2 The offence took place on 1 February 1997. The author was interviewed that same evening by the investigating detective, and informed of the investigation into the murder of Mr. M. He was placed in custody overnight. He was questioned by the same detective in a formal record of interview the following morning.[2] He did not request the services of an interpreter during the interview, nor was he considered by the investigating officers to require such assistance. He was formally charged with the murder of Mr. M. on 2 February 1997 and placed in custody on remand on 7 February 1997.[3]

Trial and conviction

4.3 The initial trial started in July 1998, but was aborted due to the illness of counsel for the co-accused. The second trial started on 9 November 1998 in the Supreme Court of Queensland. The author was provided with free legal representation. At trial, he gave evidence in person. No request was made to the trial judge for the assistance of an interpreter, and the point was never raised before the Court. The record of interview of 2 February 1997 (conducted the morning after the murder) was played to the jury. The author was convicted of murder on 25 November 1998.

Appeal

4.4 The author sought leave to appeal his *conviction* from the Supreme Court of Queensland to the Court of Appeal, on the ground that his conviction was unsafe. No particulars were given. The author conducted his appeal in person. The Court of Appeal arranged for an interpreter to attend by telephone from Sydney but the author declined this offer. The appeal against *conviction* was unanimously dismissed by the Court of Appeal on 16 July 1999.[4] An application for an extension of time within which to apply for leave to appeal against *sentence* was refused. On the argument that the author did not have an interpreter in court and was disadvantaged both in fully grasping the Crown's case and in giving his own evidence, the Court of Appeal found that there were no reasonable arguments supporting the appeal.

4.5 The author subsequently sought leave to appeal from the High Court of Australia[5] arguing that he had suffered a miscarriage of justice because he did not sufficiently understand the trial in which he was convicted of murder. On 24 November 2000, the High Court dismissed the application.

On admissibility

5.1 The State party submits that the allegation of a violation of article 14, paragraph 3 (f), is inadmissible as incompatible *ratione materiae* with the Covenant, and has not been sufficiently substantiated. In the State party's view, the author's complaint is essentially that he was not able to speak his native tongue, Swahili, during police investigations or court proceedings, notwithstanding that the record of interview and the trial transcript reveal that he could express himself adequately in the court's official language. It understands the author's notion of a "fair trial", within the meaning of article 14 of the Covenant, to suggest a right, in criminal proceedings, to express oneself in the language in which one normally expresses oneself, and that the denial of an interpreter in such circumstances constitutes a violation of article 14, paragraph 3 (f).

5.2 The State party recalls the Committee's jurisprudence that this article does not provide any right to have court proceedings conducted in the language of one's choice or to express oneself in the language in which one normally expresses oneself. If members of a linguistic minority or aliens are sufficiently proficient in the court's official language, they have no right to the free assistance of an interpreter.[6] The State party submits that the author has not shown that he was unable to address the police officers and the court in simple but adequate English, and, accordingly, that he was incapable of being defended without interpretation before the court.

5.3 Alternatively, the State party submits that the communication does not reveal any facts in substantiation of the author's claim that he was unable to address the investigating police officers, or the courts, in adequate English. In respect of the record of interview, the State party submits that the investigating detective asked the author whether or not he understood the questions put to him, and whether or not he was able to effectively communicate a response to those questions. In each case, the author affirmed his ability to understand and communicate in English.

5.4 Concerning the conduct of the trial in the Supreme Court, the State party notes that the records show that there was no request made either by the author or his lawyer for an interpreter. The records reveal that the author understood the questions put to him, and was able to make himself understood. Those representing the author at trial, and at the High Court felt that he was able to communicate sufficiently in English. Neither counsel nor the author, at any stage in the proceedings, requested an adjournment on the basis that the author did not understand what was going on. The State party recalls that the author himself gave evidence at the trial without the assistance of an interpreter and also argued his own case on appeal, declining the services of an interpreter. In dismissing the author's appeal, the Court of Appeal found that there was no evidence, at trial or on appeal, that the author could not communicate in, or comprehend, English. It noted the Court's observation that the author's counsel did not find it necessary to obtain an interpreter to receive instructions, nor to have an interpreter in court during the trial. Even more telling, the State party submits, was the fact that the author refused the offer to address the Court in Swahili by utilizing the services of an interpreter (as arranged by the Court). Further, it submits that the judges of the Court of Appeal who heard the author in person on appeal said they could understand his submissions.

5.5 Similarly, the State party refers to the finding of the High Court which found that there was no merit in the claim, that the author was denied an interpreter throughout the proceedings, sufficient to cast doubt on the conviction and to warrant the grant of special leave. Furthermore, it notes that the Court was not convinced that English was the author's fourth language, as claimed, given that he came from Tanzania, where English is widely spoken. The State party recalls the Court's observation that the author had lived in Australia for a number of years before his conviction, and that no application was made for an interpreter by the applicant or his counsel at the trial. Besides, the High Court noted that the judges of the Court of Appeal who heard the applicant in person on the appeal said they could understand his submissions.

5.6 On the allegation that the author was assaulted by the investigating detective and forced to participate in a record of interview, the State party does not understand the author to be making a separate claim in this respect but to be offering a reason for his refusal to accept the services of a court-appointed interpreter. However, the State party submits that, to the extent that these allegations raise the question of violations of articles 14, paragraph 3 (g), 7 and/or 10, paragraph 1, the author has failed to exhaust domestic remedies in pursuing those allegations, and that therefore his claim is inadmissible.

5.7 In the alternative, the State party submits that the author has failed to submit sufficient evidence substantiating his allegation, and that, therefore, the Committee should declare this allegation inadmissible on the grounds of non-substantiation. The State party submits the report of the investigating detective to refute the allegations of coercion and assault.[7]

5.8 On the alleged violation of article 14, paragraph 5, the State party submits that, since the author does not give particulars of the basis upon which he asserts a violation of this article, his allegations in this respect are inadmissible as incompatible with that provision, and further, that he has failed to substantiate his claim.

5.9 The State party notes that the Committee has considered the application of article 14, paragraph 5 to domestic legal systems and recognized that the phrase "according to law" permits States to regulate the domestic modalities of the exercise of the right of review, provided that they do not so regulate it as to preclude effective access.[8] The State party argues that "the regulation of the number of appeals heard by the High Court does not preclude effective access to that court by applicants seeking review of decisions made by lower courts".[9] It submits that it regulates the exercise of the right to review by the High Court by requiring applicants to obtain special leave to appeal. In considering whether to grant an application for special leave to appeal, the High Court may have regard to any matters that it considers relevant but shall have regard to: (a) whether the proceedings in which the judgement to which the application relates was pronounced involve a question of law: 1. that is of public importance, whether because of its general application or otherwise; or 2. in respect of which a decision of the High Court, as final appellate court, is required to resolve differences of opinion between different courts, or within the same court, as to the state of the law; and (b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgement to which the application relates. In addition to these mandatory factors, the High Court will take into consideration whether: judgement from which appeal is sought is correct or unattended with sufficient doubt; there are insufficient prospects of success of an appeal; the proposed appeal exclusively involves questions of fact; the proposed appeal is not a suitable vehicle for determination of the point sought to be agitated; and there is a real possibility of a miscarriage of justice. The State party recalls that the conformity of this requirement with the protection guaranteed by article 14, paragraph 5, was previously considered by the Committee in *Pereira v. Australia*,[10] where the Committee observed that article 14, paragraph 5 does not require an appellate court to "proceed to a factual retrial, but that a Court conduct an evaluation of the evidence presented at the trial and of the conduct of the trial".

5.10 The State party further submits that the High Court is the most appropriate body to determine whether or not there are sufficient grounds for granting special leave to appeal, and, in particular, whether the circumstances of a particular case are such as to warrant the utilization of the full resources of the High Court. To the extent that the author's communication would require the Committee to assess the substantive, rather than the procedural, correctness of the decision of the High Court, the State party submits that this would require the Committee to exceed its proper functions under the Optional Protocol. In this respect, it refers to the Committee's jurisprudence.[11]

5.11 The State party refers to the Committee's jurisprudence that States parties cannot be held accountable for decisions that lawyers may choose to make when exercising their professional judgement, unless it is manifestly evident that counsel acted in a manner contrary to his or her client's interests.[12] With respect to the contention that the author did not have an effective appeal since the High Court did not re-examine witnesses and counsel did not advance proper grounds of appeal, the Committee has held that these allegations do not in themselves support the contention that the author did not have a review of his sentence by a higher tribunal according to law.[13]

5.12 With respect to the adequacy of the review process available to the author, the State party submits that the fact that his application for special leave to appeal was dismissed by the High Court cannot, by itself, constitute evidence that he was not afforded an adequate and sufficient right to review. The State party submits that no issue arises from a limitation of appeals to questions of law. Although the fact that no legal questions are raised in an appeal is one factor that might influence the High Court to dismiss an application for special leave in a particular case, an application for special leave to appeal to the High Court is not exclusively restricted to questions of law. Similarly, the fact that the High Court is generally deferential to the findings of fact made by the lower court does not mean that the Court will not review such findings if the circumstances of the case so demand. The recognized ground for granting special leave to appeal, namely a "real possibility of miscarriage of justice" indicates that the High Court will undertake a consideration of the facts if so required.[14]

5.13 The State party submits that no question arises regarding the author being denied "effective access" to the High Court. It argues that he had access to the reasons for the judgement of the court from which appeal was sought; he had sufficient time in which to prepare his appeal; he had access to counsel, and he was entitled to, and did, make submissions to the Court.

5.14 The State party understands the author's claim that the High Court Registrar "forced" him to accept the assistance of a solicitor who did not know the particulars of his case and who refused to use the points of law raised in his application, to be an extension of the alleged denial of the right of review, and not a separate allegation. However, to the extent that this claim raises issues under article 14, paragraphs 3 (d), and (b) regarding the preparation of a defence, the State party submits the claim is incompatible *ratione materiae* with the provisions of the Covenant, and is therefore inadmissible.

5.15 The State party disputes the claim that the Registrar of the High Court forced the author to accept the assistance of counsel. Rather, the author agreed to accept the pro bono services of counsel in lieu of representing himself.[15] The State party submits that, in any event, the right of the accused to choose his or her own lawyer is not absolute.

On the merits

5.16 On the claim of a violation of article 14, paragraph 3 (f), the State party reiterates its arguments on the admissibility of this claim. It refers to the author's allegation that "the high court judge asked three times where the interpreter was and the solicitor said that he knew the case, [sic]" and asserts that, contrary to this allegation, the transcript of the application for special leave to the High Court shows that the judge asked at one point only whether or not the applicant had an interpreter. The judge was informed by the respondent that the Court had arranged for an interpreter by telephone line to be made available if necessary, but the author's counsel felt that he had received sufficient instructions to put the matter before the Court. Satisfied with this response, the High Court reconsidered the author's application for leave to appeal and ultimately dismissed it.

5.17 While Australian law does not give everyone a right to speak his or her own language in court (which the Committee has held does not per se violate article 14[16]) those unable to speak or understand English are provided with the services of an interpreter. Such assistance would have been available to the author, had the facts required it. Australian law recognizes that the provision of an interpreter is a matter which arises at earlier stages of the criminal justice process than the appearance of the accused in court. Thus, section 101 of the Police Powers and Responsibilities Act 1997 (Qld) provides that a police officer must arrange for the presence of an interpreter if he or she reasonably suspects a person in custody is unable, because of inadequate knowledge of the English language, or a physical disability, to speak with reasonable fluency in English. Regulation 73 of the Police Responsibilities Code in Schedule 2 of the Police Powers and Responsibilities Act 1997, states, in subparagraph (2), that the investigating police officer may ask questions that indicate whether or not the person in custodies is inter alia, capable of understanding the questions put to him or her. The State party argues that from the record of interview, one cannot infer that the investigating detective should have suspected that the author had an inadequate knowledge of English to speak with "reasonable fluency in the language". Finally, section 131A (1) of the Evidence Act 1977 (Qld) provides that in a criminal proceeding, a court may order the State to provide an interpreter for a complainant, defendant or witness, if the court is satisfied that the interests of justice so require. According to the State party, section 131A is compatible with article 14, paragraph 3 (f) of the Covenant, and, given the broad coverage of the "interests of justice", goes even further in its protection of the accused.

5.18 On the author's claim of a violation of article 14, paragraph 5, the State party submits that the Committee should dismiss the claim as unmeritorious for the reasons set out above (paras. 5.8 to paras. 5.13).

Comments by the author

6.1 By letter of March 2002, the author responded to the State party submissions. He contests the State party's arguments on admissibility and merits and reiterates his two claims of a violation of article 14, paragraphs 3 (f) and 5. He also gives detailed information on statements in the trial transcripts made by the investigating detective and the witnesses which, according to him, shows that they were all inconsistent and unreliable in their testimony.

6.2 On the issue of his treatment by the investigating detective, the author reiterates that he "was assaulted during his police interview by him". He states that he was asked during the trial to identify the person who assaulted him and he identified the investigating detective.

6.3 In addition, the author contends that he thinks the reason his lawyer did not request an interpreter during the trial was because of the costs involved. He notes that while English is widely spoken in Tanzania this does not mean that everyone speaks or understands it. He admits that "he could express himself reasonably, but at no time did he have much comprehension of the proceedings", and adds that in his summing-up the trial judge should have requested the jury to take into account his difficulties with the English language.

6.4 Finally, he argues, without giving further details, that the jury was prejudiced against him because of circumstantial evidence, and because he is black and had language difficulties.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant.

7.2 As required under article 5, paragraph 2 (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another international procedure of investigation or settlement.

7.3 With respect to the claim that the author was denied the services of an interpreter, the Committee finds that the author has failed to substantiate his claim sufficiently, for the purposes of admissibility. It notes from the documentation provided that the author could express himself adequately in English, that he did not apply for an interpreter during the trial at which he gave evidence, that he refused the assistance of an interpreter during the Court of Appeal hearing at which he represented himself, and that he concedes in his response to the State party's submission that "he could express himself reasonably" in the English language. The Committee reaffirms that the requirement of a fair hearing does not obligate States parties to make the services of an interpreter available ex officio or upon application to a person whose mother tongue differs from the official court language, if such person is otherwise capable of expressing himself adequately in the official language of the court.[17] The Committee therefore finds this part of the claim inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

7.4 With respect to the issue of the alleged assault on the author by the investigating detective, the Committee observes that it remains unclear whether the author claims a separate violation of the Covenant in this regard, or whether it is merely a reason why he refused the services of an interpreter during his Court of Appeal hearing. In any event, the Committee finds that neither has the author demonstrated that he has exhausted domestic remedies in this respect, nor has he substantiated his claim for the purposes of admissibility. A mere allegation with no further information on the facts is insufficient to raise a claim under the Covenant. The Committee therefore finds any claim of ill-treatment by the police inadmissible under articles 2, and 5, paragraph 2 (b) of the Optional Protocol.

7.5 With respect to the issue of a violation of article 14, paragraph 5, the Committee observes that it is not clear from the author's submission on what grounds he makes such a claim. This article protects his right to have his conviction and sentence reviewed by a higher tribunal. It appears that his claim relates to the dismissal by the High Court of his application for special leave to appeal as well as the fact that he was allegedly "forced" to accept a legal aid lawyer who was entrusted to his case only the day before his application to the High Court and during the hearing his lawyer allegedly failed to bring up the arguments outlined in the author's application. The Committees notes that the mere dismissal of a request for special leave to appeal is not sufficient to demonstrate that there has been a violation of article 14, paragraph 5. It recalls[18] that this article does not require an appellate court to proceed to a factual retrial, "but that it conduct an evaluation of the evidence presented at the trial and of the conduct of the trial". The Committee notes from the judgement of the Court of Appeal that it did evaluate the evidence against the author and specifically dealt with the author's main claim that he should have been provided with an interpreter. The High Court also examined this claim and rejected it. The Committee also observes that the complaints made against counsel do not support the allegation of a violation of article 14, paragraph 5. It, therefore, finds this part of the communication inadmissible on the grounds of insufficient substantiation, under article 2 of the Optional Protocol.

7.6 To the extent that the author's arguments relating to counsel's involvement in his application to the High Court may raise an issue under article 14, paragraphs 3 (b) and (d), the Committee finds that the author has failed to substantiate any such claim. Similarly, the Committee finds that the new claim of "racial prejudice" raised by the author in his letter of March 2002 has also not been substantiated. These claims are therefore inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under articles 2, 3 and 5, paragraph 2 (b) of the Optional Protocol;

(b) This decision be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] No further information on this point is provided and the author does not specifically state it as a claim.

[2] The State party provides a copy of the transcript of the police record of interview.

[3] Neither the State party nor the author indicates where the author was between 2 and 7 February1997.

[4] A copy of the decision of the Court of Appeal is attached to the State party submissions.

[5] The State party has provided a copy of the transcript from the High Court.

[6] The State party refers inter alia to the Committee's decisions in *Guesdon v. France, Communication No. 219/1986, Views adopted on 25 July 1990; Cadoret and Le Bihan v. France, Communication Nos. 221/1987 and 323/1998, Views adopted on 11 April 1991; Barzhig v. France, Communication No. 237/1998, Views adopted on 11 April 1991.*

[7] The State party provides a copy of the report, dated 19 September 2001, prepared by the detective in question describing the procedure and details behind the arrest and interview of the author in the police station. Included is a copy of the statement prepared by the investigation detective, and submitted during the court proceedings.

[8] The State party refers to *HRC, general comment No. 13/21 of 12 April 1984, para. 17.* "Domestic modalities" include matters such as the procedures of appeal, access to and the powers of reviewing tribunals, requirements for appeals, and the way in which the procedure before the review tribunal takes account of the fair and public hearing requirements of article 14, paragraph 1. It also refers to *Consuelo Salgar de Montejo v. Colombia, Communication No. 064/1979, Views adopted on 24 March 1982.*

[9] The State party also refers to article 2 (1) of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") which states that:

> "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of his right, including the grounds on which it may be exercised, shall be governed by law." In applying this provision, the European Commission on Human Rights (ECHR) has held that it is sufficient for a State to limit a right of appeal to questions of law.

[10] Communication No. 536/1993, Inadmissibility decision adopted on 28 March 1995.

[11] *Maroufidou v. Sweden*, Communication No. 58/1979, Views adopted on 9 April 1981.

[12] The State party refers to *Tomlin v. Jamaica*, Communication No. 589/1994, Views adopted on 16 July 1996.

[13] The State party refers to *Tomlin v. Jamaica*, Communication No. 589/1994, Views adopted on 16 July 1996.

[14] As an example, the State party refers to, *Chamberlain v. The Queen (No. 2)* (1984) 153 CLR 521, where the High Court quashed the conviction on the ground that the evidence presented to the jury at trial failed to establish beyond reasonable doubt the guilt of the accused; *M v. The Queen* (1994) 181 CLR 487.

[15] The State party submits a copy of the letter from the Acting Chief Executive and Principal Registrar of the High Court to the author, dated 24 August 2001, in which it is explained that the author was given the choice of either appearing for himself with an interpreter or being represented by counsel and was in no way "forced" to accept the representation of counsel.

[16] The State party refers to Communication No. 219/1986, supra.

[17] Communication No. 219/1986, *Guesdon v. France*, Views adopted on 25 July 1990.

[18] *Perera v. Australia*, Communication No. 536/1993, Inadmissibility decision adopted on 28 March 1995.

R. Communication No. 987/2001, *Gombert v. France**
(Decision adopted on 18 March 2003, seventy-seventh session)

Submitted by:	Mr. Philippe Gombert (represented by counsel, Maître Philippe Dehapiot)
Alleged victim:	The author
State party:	France
Date of communication:	24 September 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 March 2003,

Adopts the following:

Decision on admissibility

1. The author is Mr. Philippe Gombert, a French citizen, currently serving a prison sentence at the Melun detention centre in France. He claims to be the victim of a violation by France of article 15, paragraph 1, of the Covenant. His communication also raises issues relating to the right to a defence under article 14, paragraph 3 (a), of the Covenant. He is represented by counsel.

The facts as presented by the author

2.1 On 31 January 1994, the author was charged with offences under the narcotics legislation, namely the illegal import or export of narcotics and conspiracy to import or export narcotics.

2.2 In an order dated 20 April 1998, the investigating judge redefined the charges against the author in the light of the repeal of the former Criminal Code as of 1 March 1994 and its replacement by a new Criminal Code. The author was subsequently committed for trial in the Marseille criminal court on charges of importing narcotics as part of an organized gang, obtaining, possession, supply, sale and transport of narcotics, and conspiracy to commit a crime, all of which are offences under the new Criminal Code.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 In a judgement dated 3 November 1998, the Marseille criminal court found the accused guilty of the charges against him and ordered that he should continue to be held and serve a term of 15 years' imprisonment.

2.4 On 4 November 1998, the author appealed against the judgement.

2.5 By a decision dated 2 February 2000, the Aix-en-Provence appeal court upheld the criminal court judgement and sentenced the author to 13 years' imprisonment.

2.6 In a decision dated 3 May 2001, the Court of Cassation rejected an application by the author.

The complaint

3.1 The author claims that he was liable to prosecution only for the offences of illegal import or export of narcotics, which are punishable under paragraph 1 of article 222-36 of the new Criminal Code. He argues that, in accordance with the principle of retroactivity *in mitius*, his sentence should have been reduced to 10 years (the maximum penalty under article 226-36, paragraph 1) instead of the 20 years laid down for the import of narcotics under the former legislation - article L 627 of the Public Health Code. The author maintains that article 338 of the Amendment Act of 16 December 1992 denies this principle in providing that offences of import or export committed before the entry into force of the new Criminal Code but tried after its entry into force shall continue to be punishable by 20 years' imprisonment if they were committed by an organized gang. The author contests the redefinition of the offences to apply, in his case, the aggravating circumstances of membership of an "organized gang" - a charge unknown in criminal law at the time of the offences - and to enable him to be sentenced to 13 years' imprisonment, thereby violating article 15, paragraph 1, of the Covenant.

3.2 The author further claims that the redefinition of the offences violates his right to a defence insofar as the aggravating circumstance of membership of an "organized gang" should have been subject to formal supplementary notification prior to committal, as recommended in the March 1994 circular from the Ministry of Justice. The author claims that, owing to the court's failure to observe that formality, he was unaware of the charges against him and unable to defend himself.

3.3 The author states that domestic remedies have been exhausted, as described above.

3.4 The author also states that, on 4 December 1997, he submitted a petition to the European Court of Human Rights claiming a violation of article 5, paragraph 3, and article 6, paragraph 1, of the European Convention on Human Rights on the grounds of the excessive length of his pre-trial detention of the criminal proceedings against him. The Court ruled on this application in a decision dated 13 February 2001, which became final on 13 May 2001. The Court found that a violation of the provisions invoked by the author had occurred.[1]

The State party's observations on admissibility

4.1 In its comments dated 4 October 2001, the State party disputes the admissibility of the communication.

4.2 In the first place, the State party recalls applicable domestic law.

4.3 With reference to the relevant legislative texts, the State party describes the changes introduced by the reform of the Criminal Code, and notably the insertion of provisions to combat trafficking in narcotics, which had previously been part of the Public Health Code.

4.4 Under the old legislation, the import and export of narcotics had been punishable as follows:

- Illegal import or export of narcotics - 10 to 20 years' imprisonment (Public Health Code, art. L 627, para. 1);
- Conspiracy to import or export narcotics illegally - 10 to 20 years' imprisonment (Public Health Code, art. L 627, para. 2).

4.5 The new Criminal Code does not contain exactly the same definitions of offences as the Public Health Code, but now provides that (a) the illegal import or export of narcotics is punishable by 10 years' imprisonment (art. 222-36, para. 1), and (b) the illegal import or export of narcotics by an organized gang is punishable by 30 years' rigorous imprisonment (art. 222-36, para. 2).

4.6 Thus, while the offence of import or export of narcotics remains unchanged, it is now punishable by 10 years' imprisonment. The offence of conspiracy to import or export narcotics illegally no longer exists. A new offence has been created concerning import or export of narcotics as part of an organized gang, punishable by 30 years' rigorous imprisonment.

4.7 In order to overcome the difficulties of implementing the new Criminal Code arising from the differences between the definitions of offences, the legislation includes a number of transitional provisions. With regard to drug trafficking, article 338 of the Amendment Act, No. 92.1336, dated 16 December 1992, provides that offences of import or export committed before the entry into force of the new Criminal Code but tried after its entry into force shall still be punishable by 20 years' imprisonment if committed by an organized gang.

4.8 The State party explains that this provision reflects the legislator's desire to maintain, for the most serious offences of import or export of narcotics, the same penalties as under the old legislation, without contravening the principle of non-retroactivity of the more severe law. This situation made it possible to abolish the sentence of 30 years' rigorous imprisonment and introduce penalties for narcotics trafficking by organized gangs, while maintaining efforts to combat such offences - for, according to the State party, had the traditional rules governing conflicting criminal laws been applied, the effect in some cases could, paradoxically, have been to render narcotics traffickers tried after the reform's entry into force, for offences committed before its entry into force, liable to sentences that were not only lighter than those provided for under the new Code but also lighter than those under the old legislation. That would have been the result of immediate application of the provisions of article 131-4 of the new Code, which establishes a maximum of 10 years' ordinary imprisonment, whereas article L 627 of the Public Health Code provided for up to 20 years' imprisonment.

4.9 The State party claims that adoption of the Amendment Act thus permitted the temporary extension of the penalties previously applied to the offences that were most prejudicial to public order and health.

4.10 With reference to judicial practice, the State party maintains that the principles laid down by the 1992 Act have been applied by criminal courts in a manner that fully respects the principle of retroactivity *in mitius*, which is established in the case law of the Constitutional Council (decision of 19-20 January 1981) and explicitly confirmed in the new Criminal Code. Article 112-1 of the Criminal Code provides that:

> "Only acts that constituted an offence at the time they were committed are punishable. Only sentences imposing penalties that were legally applicable at that time may be imposed. The new provisions shall apply, however, to offences committed before their entry into force and not yet subject to a final sentence, where they are less severe than the old provisions."

4.11 In a case where the only charge is import or export of narcotics, article 222-36, paragraph 1, which provides for a penalty of 10 instead of 20 years' imprisonment, shall apply immediately. According to the State party, that would be the only case in which the principle of retroactivity *in mitius* would be applicable, and indeed the Court of Cassation had not hesitated to strike down appeal court decisions sentencing anyone to a prison term longer than the maximum now laid down by article 222-36, paragraph 1 (Cass crim 19.9.1995).

4.12 With regard to offences of import or export of narcotics and of conspiracy to import or export narcotics, the Court of Cassation has emphasized that, "with the entry into force of the Criminal Code", it now finds "legal support in articles 132-71 [defining the concept of an organized gang] and 222-36 of the Code, which define the offence of illegal import of narcotics as part of an organized gang, a circumstance that encompasses the element of conspiracy" (Cass crim 22.6.1994 Beltran bull crim No. 247). This conclusion was subsequently confirmed (Cass crim 24.10.1996 Landeau: "The aggravating circumstances of membership of an organized gang encompasses the element of conspiracy").

4.13 According to the State party, the Court of Cassation, applying quite logically the principle of non-retroactivity of the more severe criminal law, has ruled that the new law is not applicable. The Court concluded that "article 222-36, being more severe than the provisions in force at the time of the offence insofar as it punishes such offences with 30 years' rigorous imprisonment, is consequently not applicable in this case". It considered that, in such cases, article 338 of the Amendment Act, providing for 20 years' ordinary imprisonment, should be applied, as the only temporary exception to the principle laid down in article 131-4. Since this penalty corresponds exactly to the penalty previously applicable to offences of this kind, there is no need to apply the principle of retroactivity *in mitius* in this case.

4.14 In the second place, the State party describes the application of domestic law in the case of Mr. Philippe Gombert.

4.15 The State party recalls that the author was initially charged on 30 January 1994 with illegal import or export of narcotics and conspiracy to import or export narcotics (Public Health Code, art. L 627).

4.16 However, in the order dated 20 April 1998, committing the author for trial to the criminal court, the offences had been redefined. Under the 1992 Amendment Act and the above-mentioned case law of the Court of Cassation dating from 1994, the offences of "illegal import or export of narcotics" and "conspiracy to import or export narcotics illegally" were removed from the statute books and redefined as "illegal import or export of narcotics as part of an organized gang".

4.17 According to the State party, this redefinition means that the offences with which Mr. Gombert was charged are covered only by paragraph 2 of article 222-36 of the new Criminal Code, which prohibits the illegal import or export of narcotics as part of an organized gang. The State party contends that the author's claim that he is liable only under paragraph 1 of that article, which relates only to illegal import or export of narcotics, is incorrect, and that he has therefore not been wrongly denied retroactivity *in mitius*, since that principle is not applicable in the present case.

4.18 The State party also points out that, contrary to the author's assertions, the redefinition of the offences has in no way violated his right to a defence. In the first place, the State party recalls that the March 1994 circular invoked by the author did not have a direct bearing on his situation. The circular concerned persons who had been charged only with import or export of narcotics and explained how that offence was to be redefined under the new Criminal Code. It did not, in any case, cover persons who had also been charged with the offence of conspiracy to import narcotics. The State party again points out that the author had, in January 1994, already been duly charged with the offence of importing narcotics and with another offence, conspiracy to import narcotics. Moreover, the author had been questioned on both offences by the investigating magistrate in charge of the case. In the State party's view, the author's circumstances were thus not those described in the circular.

4.19 The State party further argues that the concept of "organized gang" was not a substantively new point, which was never raised during the investigation stage and of which the author became aware only at the hearing. It reflects in effect a technical amendment to the offence of "conspiracy", arising from the entry into force of the new Criminal Code. Consequently, in the view of the State party, there was no legal requirement to give notice of an additional charge relating to another offence. The State party therefore considers that the author cannot validly claim to have been ignorant of the charges against him, since these are identical offences under different names. The author thus had every opportunity to mount whatever defence he wished against the charges relating to an "organized gang", previously described as "conspiracy".

4.20 The State party further points out that the circular in question is not legally binding. It is merely a commentary on the provisions of the legislation, issued in order to explain the new rules and, if necessary, facilitate their application: it is in no way binding on the judicial authorities.

4.21 Thus, according to the State party, article 338 of the Amendment Act, far from violating the principle of retroactivity *in mitius* is intended to protect the rights of defendants charged with narcotics trafficking as part of an organized gang, since application of a more severe criminal law (Criminal Code, article 222-36, paragraph 2, defining that offence) had been ruled out and a punishment identical to that previously applied remains applicable on a temporary basis.

4.22 Lastly, the State party considers that the redefinition was carried out in a context of settled law, and thus that the question of the violation of article 15 of the Covenant did not arise:

as the Court of Cassation held in its decision of 3 May 2001,[2] the article was not applicable in this case since, contrary to the author's claims, the law did not provide for a lighter sentence in his situation.

4.23 The State party therefore considers that the communication is inadmissible insofar as it falls outside the scope of article 15 of the International Covenant on Civil and Political Rights.

The author's comments on the State party's observations on admissibility

5. In his letter of 17 July 2002, the author stated that he did not intend to submit further comments in response to the State party's submissions.

Deliberations of the Committee on admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a) and (b), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement and that the author has exhausted all domestic remedies.

6.3 In the light of the State party's arguments, the Committee notes that the initial definition of the offences imputed to the author would cover all the elements of the crime of which he was accused following the entry into force of the new Criminal Code. Consequently, the Committee considers that the author has not substantiated, for the purposes of admissibility, his complaint of a violation of article 14, paragraph 3 (a), of the Covenant.

6.4 With regard to the complaint of a violation of article 15, paragraph 1, of the Covenant, the Committee notes that the State party's arguments that the author has not received a sentence more severe than that which was applicable at the time of the crime to the acts constituting the offence for which the author was sentenced, and that he did not have a right to a lighter sentence under the transitional provisions of the new Criminal Code. The Committee therefore considers that the author has not substantiated this part of the complaint for the purposes of admissibility.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in French, English and Spanish, the French text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The issues were not those submitted in connection with the present case.

[2] The Court of Cassation stated that, "since article 338 of the Amendment Act of 16 December 1992 does not violate article 15, paragraph 1, of the International Covenant, which is not applicable in this case, the penalty provided in article 222-36, paragraph 2, of the Criminal Code, punishing the offence of illegal import of narcotics as part of an organized gang, being more severe than the penalty previously applied to the offences replaced by this offence, the appeal court's decision is justified".

S. Communication No. 989/2001, *Kollar v. Austria** (Decision adopted on 30 July 2003, seventy-eighth session)

Submitted by:	Walter Kollar (represented by Mr. Alexander H.E. Morawa)
Alleged victim:	The author
State party:	Austria
Date of communication:	6 December 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 July 2003,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mr. Walter Kollar, an Austrian citizen, born on 3 August 1935. He claims to be a victim of violations by Austria[1] of articles 14, paragraph 1, and 26 of the Covenant. He is represented by counsel.

1.2 Upon ratification of the Optional Protocol on 10 December 1987, the State party entered the following reservation: "On the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

The facts as submitted by the author

2.1 Since 1978, the author was employed as independent examining doctor (*Vertrauensarzt*) and, as of February 1988, as senior medical doctor (*Chefarzt*) at the Salzburg Regional Medical Health Insurance for Workers and Employees (*Salzburger Gebietskrankenkasse für Arbeiter und Angestellte*).

2.2 On 22 September 1988, following accusations of illegal and inappropriate conduct against the author and his former supervisor, the Chairman of the Insurance unsuccessfully sought approval by the employees' representative committee (*Betriebsrat*) to suspend the author from his function.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 On 23 September 1988, the employer brought criminal charges against the author, which were ultimately not pursued by the prosecutor. The employer then initiated an equally unsuccessful private criminal prosecution.

2.4 On 27 October 1988, the Board of the Insurance initiated disciplinary proceedings against the author and suspended him on reduced pay. On 22 February 1989, a disciplinary committee was constituted. The author was accused of inappropriate conduct involving personal enrichment, at the expense of his employer. On 22 January 1990, the disciplinary committee, having met several times in camera, found the author guilty on certain counts, such as illegal prescription of medication to the financial detriment of his employer, a violation of his loyalty and confidentiality duties by holding a press conference on the charges against his former supervisor, and the illegal admission of patients to a specific rehabilitation centre. No appeal from this decision was possible.

2.5 On 23 January 1990, the Insurance purported to dismiss the author from service on the basis of the disciplinary committee's findings, allegedly without having complied with certain procedural requirements. After complying with these requirements, the Insurance, on 9 November 1990, stated that it considered the first dismissal effective and, in any event, dismissed the author from service a second time.

2.6 On 14 December 1988, the author appealed against his suspension of 27 October 1988 before the Salzburg Regional Court (*Landesgericht Salzburg*) which, by decision of 15 February 1989, dismissed his action. On 19 September 1989, the Linz Court of Appeal (*Oberlandesgericht Linz*) dismissed his appeal; but the Supreme Court (*Oberste Gerichtshof*), on 28 February 1990, allowed the author's appeal and referred the case back to the Regional Court, holding that it had not been established whether sufficient grounds for the suspension existed. On 7 August 1990, the Salzburg Regional Court again rejected the author's claim. This decision was upheld by the Linz Court of Appeal on 29 January 1991. On 10 July 1991, the Supreme Court again granted the author's appeal, holding that the lower courts had again failed to establish sufficient grounds for the author's suspension. On 13 July 1992, the Salzburg Regional Court rejected the author's legal action for the third time. Both the Linz Court of Appeal, on 9 March 1993, and the Supreme Court, on 22 September 1993, dismissed the author's appeal.

2.7 The author also brought a legal action against his first dismissal from service, dated 23 January 1990. On 9 October 1990, the Salzburg Regional Court, acting under its labour and social law jurisdiction, granted the author's claim. On 11 June 1991, the Linz Court of Appeal and, on 6 November 1991, the Supreme Court dismissed the employer's appeal, holding that the employment relationship between the author and his employer remained effective.

2.8 On 16 November 1990, the author brought a legal action against his second dismissal from service, dated 9 November 1990. Despite his objection, the proceedings were suspended on 19 March 1991, pending the final outcome of the proceedings against the first dismissal. Subsequent to the Supreme Court's decision of 6 November 1991, legal proceedings in respect of the second dismissal resumed, and, on 25 November 1993, the Salzburg Regional Court rejected the author's claim. On 29 November 1994, the Linz Court of Appeal and, on 29 March 1995, the Supreme Court, dismissed the author's appeals, finding him guilty of negligent breaches of duty, which justified his dismissal.

2.9 On 7 February 1996, the author lodged an application with the former European Commission on Human Rights, alleging violations of his rights under articles 6, 10, 13 and 14 of the European Convention on Human Rights and Fundamental Freedoms, as well as article 2, paragraph 1, of Protocol No. 7 thereto. This application was never examined by the Commission. Instead, the European Court of Human Rights, sitting as a panel of three judges, on 17 March 2000 (after the entry into force of Protocol No. 11), declared the application inadmissible. With regard to the author's complaints about the disciplinary proceedings instituted by his employer, the Court held that "the role of the Health Insurance Office was that of a private employer, the disciplinary proceedings complained of were not conducted by a body exercising public power, but were internal to the applicant's workplace for the purpose of establishing whether or not he should be dismissed […]".[2] The Court concluded that this part of the application was incompatible *ratione personae* with the Convention. With respect to articles 13 and 14 of the Convention as well as article 2 of Protocol No. 7, the Court found that the matters complained of did not disclose any appearance of a violation of these rights.[3]

The complaint

3.1 The author claims that he is a victim of violations of articles 14, paragraph 1, and 26 of the Covenant because he was denied equal access to an independent and impartial tribunal, as the Austrian courts only reviewed the findings of the disciplinary committee for gross irregularities.

3.2 By reference to the Committee's decision in *Nahlik v. Austria,*[4] the author contends that article 14, paragraph 1, of the Covenant also applies to the proceedings before the disciplinary committee. He submits that the disciplinary committee denied him a public hearing by meeting in camera. The exclusion of the public was not necessary to protect his patients' right to privacy, since their names could have been replaced by acronyms. The author claims that his right to a fair hearing has been violated because the principle of "equality of arms" was infringed in several ways. Firstly, the prosecuting party was given an opportunity to discuss the charges against him with the chairman of the disciplinary committee, while his defence was not provided such an opportunity. Moreover, the time he was given to prepare his defence was disproportionately short. Since the committee's chairman refused to receive his lawyer's written reply to the written accusations of the prosecuting party, the defence was required to present all arguments orally during the hearings. As a result, a medical expert who testified before the committee had no access to the written submissions of the defence, relying solely on the prosecuting party's submissions.

3.3 Furthermore, the author claims that the disciplinary committee lacked the impartiality and independence required by article 14, paragraph 1, of the Covenant. Despite repeated complaints which were never decided upon by the disciplinary committee, the committee was composed of, in addition to the chairman, two members appointed by the employer and two members appointed by the employees' representative committee (*Betriebsrat*) who were subordinate to the employer. Similarly, the author's motion to replace at least one member by a medical expert was not decided upon.

3.4 The author contends that the committee's chairperson was biased since he privately discussed the case for several hours with the prosecuting party and because he rejected his written reply to the charges, pretending that it had been submitted after the expiry of the deadline and by pasting over the original note, in the file, with an instruction to transmit the submission to the prosecuting party. Moreover, the chairman reportedly also ignored various procedural objections of the defence, manipulated the records of the hearings and intimidated the author's defence lawyer as well as, on one occasion, a medical expert testifying in the author's favour. By reference to the Committee's Views in *Karttunen v. Finland*,[5] the author concludes that the chairperson displayed a bias, in violation of article 14, paragraph 1, of the Covenant.

3.5 The author also claims that he was discriminated against, contrary to articles 14, paragraph 1, and 26 of the Covenant, which require that objectively equal cases be treated equally. In support of this claim, he submits that his former supervisor, who faced similar charges, was treated differently during disciplinary proceedings and was ultimately acquitted. In the supervisor's case, three members of the disciplinary committee were replaced by senior medical doctors at the supervisor's request, while not a single member of the committee was replaced by a medical doctor in the author's own case, even though his request to that effect was based on identical arguments and formulated by the same lawyer. Moreover, his former supervisor was acquitted of the charge of having issued private prescriptions using health insurance forms, on the ground that this practice had already been established by his predecessor. Furthermore, despite an agreement between one of the author's predecessors and the Salzburg Regional Medical Health Insurance permitting such use of health insurance forms, the author was found guilty by the committee on the same charge. The committee argued that, since the predecessor had concluded the agreement in his personal capacity, the author could have invoked it only after a renewal *ad personam*.

3.6 With regard to the Austrian reservation to article 5, paragraph 2 (a), of the Optional Protocol, the author argues that the same matter "has not been examined by the European Commission of Human Rights". Thus, his complaint was declared inadmissible not by the European Commission but by the European Court of Human Rights. Moreover, the Registry of the European Court failed to advise him of its concerns about the admissibility of his application, thereby depriving him of an opportunity to clarify doubts or to withdraw his application in order to submit it to the Human Rights Committee. The author also argues that the European Court did not even formally decide on his complaint that the extremely limited review by the Austrian courts of the disciplinary committee's decision violated his right to an independent and impartial tribunal established by law (article 6, paragraph 1, of the European Convention on Human Rights and Fundamental Freedoms).

3.7 The author contends that there are substantial differences between the Convention articles and the Covenant rights invoked by him. Thus, a free-standing discrimination clause similar to article 26 of the Covenant cannot be found in the European Convention. Furthermore, article 14, paragraph 1, of the Covenant guarantees a right to equality before the courts which is unique in its form. By reference to the Committee's decision in *Nahlik v. Austria*,[6] the author adds that the scope of applicability of that provision has been interpreted more broadly than that of article 6, paragraph 1, of the European Convention.

The State party's observations

4.1 By note verbale of 17 September 2001, the State party made its submission on the admissibility of the communication. It considers that the Committee's competence to examine the communication is precluded by article 5, paragraph 2 (a), of the Optional Protocol read in conjunction with the Austrian reservation to that provision.

4.2 The State party argues that the reservation is applicable to the communication because the author has already brought the same matter before the European Commission of Human Rights, resulting in the subsequent examination of the application by the European Court of Human Rights, which assumed the tasks of the Commission following the reorganization of the Strasbourg organs pursuant to Protocol No. 11.

4.3 In the State party's opinion, the fact that the European Court rejected the application as being inadmissible, does not mean that the Court has not "examined" the author's complaints, as required by the Austrian reservation. The Court's reasoning that "there is no appearance of a violation of the applicant's rights"[7] and that the matters complained of "do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols"[8] clearly showed that the decision to dismiss the application on grounds of admissibility "also comprises far reaching aspects on the merits".

4.4 While admitting that the European Court did not examine the nature of the disciplinary proceedings against the author, the State party emphasizes the Court's finding that it cannot be held responsible for disputes between private employers, such as the Regional Health Insurance Board for Workers and Employees, and their employees.

Comments by the author

5.1 By letter of 15 October 2001, the author responded to the State party's submission, reiterating that, based on the ordinary meaning as well as the context of the State party's reservation, the Committee is not precluded from examining his communication. He insists that the Austrian reservation does not apply to his communication since the same matter was never "examined" by the European Commission. He compares the Austrian reservation to similar but broader reservations to article 5, paragraph 2 (a), of the Optional Protocol made by 16 other States parties to the European Convention, and submits that the State party is the only one that refers to an examination "by the European Commission of Human Rights".

5.2 The author considers it irrelevant that the State party, when entering its reservation, intended to prevent a simultaneous and successive consideration of the same facts by the Strasbourg organs and the Committee, arguing that the intent of the party making a reservation is merely a supplemental means of interpretation under article 32 of the Vienna Convention on the Law of Treaties, which may only be utilized when an interpretation pursuant to article 31 of the Vienna Convention (ordinary meaning, context, and object and purpose) proves insufficient.

5.3 By reference to the jurisprudence of the European and the Inter-American Courts of Human Rights, the author emphasizes that reservations to human rights treaties must be interpreted in favour of the individual. Any attempt to broaden the scope of the Austrian reservation must therefore be rejected, especially since the Committee disposes of adequate procedural devices to prevent an improper use of parallel proceedings at its disposal, such as the concepts of "substantiation of claims" and "abuse of the right to petition", in addition to article 5, paragraph 2 (a), of the Optional Protocol.

5.4 The author concludes that the communication is admissible in the light of article 5, paragraph 2 (a), of the Optional Protocol, since the Austrian reservation does not come into play. Subsidiarily, he submits that the communication is admissible insofar as it relates to the alleged violations of his rights in the disciplinary proceedings, and to the lack of an effective remedy to have these proceedings reviewed by a court of law, because the European Court of Human Rights failed to examine his complaints in that regard.

Additional observations by the State party

6.1 By note verbale of 30 January 2002, the State party made an additional submission on the admissibility of the communication in which it explained that the Austrian reservation was made on the basis of a recommendation by the Committee of Ministers, suggesting that member States of the Council of Europe "which sign or ratify the Optional Protocol might wish to make a declaration [...] whose effect would be that the competence of the United Nations Human Rights Committee would not extend to receiving and considering individual complaints relating to cases which are being or already have been examined under the procedure provided for by the European Convention".[9]

6.2 The State party argues that its reservation differs from similar reservations made by other member States pursuant to that recommendation only insofar as it directly addresses the relevant Convention mechanism, for the sake of clarity. All reservations aim at preventing any further international examination following a decision of one of the mechanisms established by the European Convention. It would, therefore, be inappropriate to deny the Austrian reservation its validity and continued scope of application on the mere basis of an organizational reform of the Strasbourg organs.

6.3 Moreover, the State party contends that, following the merger of the European Commission and the "old" Court, the "new" European Court can be considered the "legal successor" of the Commission since several of its key functions, including decisions on admissibility, establishment of the facts of a case and making a first assessment on the merits, were formerly discharged by the Commission. Given that the reference to the European Commission in the State party's reservation was specifically made in respect of these functions, the reservation remains fully operative after the entry into force of Protocol No. 11. The State party contends that it was not foreseeable, when it entered its reservation in 1987, that the protection mechanisms of the European Convention would be modified.

6.4 The State party reiterates that the same matter was already examined by the European Court which, in order to reject the author's application as being inadmissible, had to examine it on the merits, if only summarily. In particular, it follows from the European Court's rejection of the complaints concerning the disciplinary proceedings that the Court considered the merits of the complaint prior to taking its decision.

Additional comments by the author

7.1 By letter of 25 February 2002, the author notes that nothing prevented the State party from entering a reservation upon ratification of the Optional Protocol precluding the Committee from examining communications if the same matter has already been examined "under the procedure provided for by the European Convention", as recommended by the Committee of Ministers, or from using the broader formulation of a previous examination by "another procedure of international investigation or settlement", as other member States of the European Convention did.

7.2 Moreover, the author submits that the State party could even consider entering a reservation to that effect by re-ratifying the Optional Protocol, as long as such a reservation could be deemed compatible with the object and purpose of the Optional Protocol. What is not permissible, in his view, is to broaden the scope of the existing reservation in a way contrary to fundamental rules of treaty interpretation.

7.3 The author rejects the State party's argument that key tasks of the "new" European Court, such as decisions on admissibility and ascertainment of the facts of a case, were originally within the exclusive competence of the European Commission. By reference to the Court's jurisprudence, he argues that the "old" European Court also consistently dealt with these matters.

7.4 The author challenges the State party's contention that the reorganization of the Convention organs was not foreseeable in 1987, by quoting parts of the Explanatory Report to Protocol No. 11, which summarize the history of the "merger" deliberations from 1982 until 1987.

Issues and proceedings before the Committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the State party has invoked the reservation it made under article 5, paragraph 2 (a), of the Optional Protocol, which precludes the Committee from considering claims that have previously been "examined" by the "European Commission on Human Rights". As to the author's argument that the application which he submitted to the European Commission was, in fact, never examined by that organ but declared inadmissible by the European Court of Human Rights, the Committee observes that the European Court, as a result of treaty amendment by virtue of Protocol No. 11, has legally assumed the former European Commission's tasks of receiving, deciding on the admissibility of, and making a first assessment on the merits of applications submitted under the European Convention. The Committee observes, for purposes of ascertaining the existence of parallel or, as the case may be, successive proceedings before the Committee and the Strasbourg organs, that the new European Court of Human Rights has succeeded to the former European Commission by taking over its functions.

8.3 The Committee considers that a reformulation of the State party's reservation, upon re-ratification of the Optional Protocol, as suggested by the author, only to spell out what is in fact a logical consequence of the reform of the European Convention mechanisms, would be a purely formalistic exercise. For reasons of continuity and in the light of its object and purpose, the Committee therefore interprets the State party's reservation as applying also to complaints which have been examined by the European Court.

8.4 With respect to the author's argument that the European Court has not "examined" the substance of his complaint when it declared the application inadmissible, the Committee recalls its jurisprudence that where the European Commission has based a declaration of inadmissibility not solely on procedural grounds,[10] but on reasons that comprise a certain consideration of the merits of the case, then the same matter has been "examined" within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol.[11] In the present case, the European Court went beyond an examination of purely procedural admissibility criteria, considering that the author's application was inadmissible, partly for incompatibility *ratione personae*, partly because it disclosed no appearance of a violation of the provisions of the Convention. The Committee therefore concludes that the State party's reservation cannot be denied simply on the assumption that the European Court did not issue a judgement on the merits of the author's application.

8.5 As regards the author's contention that the European Court has not examined his claims under article 6, paragraph 1, of the Convention regarding the proceedings before the disciplinary committee, and that it has not even formally decided on his complaint related to the limited review of the decision of the disciplinary committee by the Austrian courts, the Committee notes that the European Court considered "that the disciplinary proceedings complained of were not conducted by a body exercising public power, but were internal to the applicant's workplace for the purpose of establishing whether or not he should be dismissed". On this basis, the Court concluded that the author's right to an effective remedy (article 13 of the European Convention and article 2, paragraph 1, of Protocol No. 7) had not been violated.

8.6 The Committee further observes that, despite certain differences in the interpretation of article 6, paragraph 1, of the European Convention and article 14, paragraph 1, of the Covenant by the competent organs, both the content and scope of these provisions largely converge. In the light of the great similarities between the two provisions, and on the basis of the State party's reservation, the Committee considers itself precluded from reviewing a finding of the European Court on the applicability of article 6, paragraph 1, of the European Convention by substituting its jurisprudence under article 14, paragraph 1, of the Covenant. The Committee accordingly finds this part of the communication inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, as the same matter has already been examined by the European Court of Human Rights.

8.7 With regard to the author's claim under article 26 of the Covenant, the Committee recalls that the application of the principle of non-discrimination in that provision is not limited to the other rights guaranteed in the Covenant and notes that the European Convention contains no comparable discrimination clause. However, it equally notes that the author's complaint is not based on free-standing claims of discrimination, since his allegation of a violation of article 26 does not exceed the scope of the claim under article 14, paragraph 1, of the Covenant. The Committee concludes that this part of the communication is also inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 10 December 1978 and 10 March 1988.

[2] European Court of Human Rights, 3rd Section, decision on admissibility, Application No. 30370/96 (*Walter A.F. Kollar v. Austria*), 17 March 2000, at para. 1.

[3] Ibid., at para. 3.

[4] Communication No. 608/1995, *Nahlik v. Austria*, decision on admissibility adopted on 22 July 1996, at para. 8.2.

[5] Communication No. 387/1989, Views adopted on 23 October 1992, at para. 7.2.

[6] Communication No. 608/1995, decision adopted on 22 July 1996, at para. 8.2.

[7] See European Court of Human Rights, 3rd Section, decision on admissibility, Application No. 30370/96 (*Walter A.F. Kollar v. Austria*), 17 March 2000, at para. 2.

[8] See ibid., para. 3.

[9] Council of Europe, Committee of Ministers Resolution (70) 17 of 15 May 1970.

[10] See, for example, Communication No. 716/1996, *Pauger v. Austria*, Views adopted on 25 March 1999, at para. 6.4.

[11] See, for example, Communication No. 121/1982, *A.M. v. Denmark*, decision on admissibility adopted on 23 July 1982, at para. 6; Communication No. 744/1997, *Linderholm v. Croatia*, decision on admissibility adopted on 23 July 1999, at para. 4.2.

T. Communication No. 1001/2001, *Strik v. The Netherlands** (Decision adopted on 1 November 2002, seventy-sixth session)

Submitted by:	Mr. Jacobus Gerardus Strik
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	29 June 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2002,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Jacobus Gerardus Strik, a Dutch national, born on 6 October 1938. He alleges that he is a victim of a violation by the Netherlands[1] of articles 5, paragraph 2, 7, 14, paragraphs 6 and 7, 15, paragraph 1, 19, paragraph 2, and 26 of the Covenant. He is not represented by counsel.

The facts as submitted

2.1 The author was employed with the municipality of Eindhoven for 30 years. On 8 April 1990, he addressed a memorandum to his employer's management and the Municipal Council of Eindhoven, complaining about the treatment he had allegedly endured under the management. Apparently he used defamatory language. The municipality of Eindhoven regarded the report as evidence of the author's neglect of duty and as defamation. Consequently, in its decision of 25 September 1990, it decided to reduce the author's two last salary increases during two years, that the author would be temporarily demoted by one rank, and that he would be transferred to a different department.

2.2 The author appealed the municipality's decision to the Ambtenarengerecht s-Hertogenbosch,[2] which on 6 June 1991 decided that the municipality was entitled to impose disciplinary measures, but that the disciplinary measures imposed were disproportionate to the nature of the breach of duty and its circumstances, the author being overworked at the time of the incident. It therefore quashed the disciplinary measures imposed by the municipality of Eindhoven, and left it open whether the municipality were to impose other disciplinary measures, taking into account the court's decision.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

2.3 On 15 December 1992, on appeal by the municipality, the Central Board of Appeal confirmed the decision of the lower court. Subsequently, on 5 January 1993, the municipality of Eindhoven took a new decision and imposed new disciplinary measures, consisting of a reduction of salary identical to its first decision.

2.4 In the meantime, the author had gone on sick leave from 11 April 1990. The medical doctor of the municipality considered that he could go back to work under certain conditions. He worked from 1 January 1991 to 1 January 1992 at the municipality's department of cultural affairs. After that, the municipality was not able to find him a post that would fit the conditions and for this reason the author was given what the municipality termed an honourable dismissal as of 1 August 1993, accompanied by an allowance of 80 per cent of his salary.

2.5 After the municipality offered the author suitable work for two months and the author refused in February 1994, the municipality decided to reduce the author's allowance for 8 months. The author contested this measure in the District Court, which in its decision of 2 July 1994, rejected the author's request for interim measures in order to halt his allowance reduction. According to the law, while one receives an allowance, one can be told to accept suitable work elsewhere in order to reduce the costs for the employer. At that time, the author had already reached the age of 55, and claims that he should be protected from such measures because of his age.

2.6 On 4 July 1996, the District Court gave its decision to the author's challenges against the municipality's decisions (a) of 5 January 1993 to reduce his salary as a disciplinary measure; (b) of 8 June 1993 to dismiss him; (c) of 23 June 1993 fixing the height of the allowance as a consequence of the reduced salary; and (d) the temporary reduction in allowance following his refusal to accept suitable work. The Court decided on 4 July 1996 in respect of the author's claims under (a) that the municipality was competent to impose new disciplinary measures and that the author's argument of *ne bis in idem* was rejected because the first disciplinary measures had been quashed and the second decision replaces the first. However, the Court was of the opinion that the punishment amounting to a reduction of a total of f. 10,000 was still disproportionate to the nature of the breach; (b) that in the specific circumstances of the case, it cannot be said that the decision to dismiss the author for lack of suitable work is unreasonable; (c) that although the Court approved the basis for the decision, it nevertheless quashed it as a result of its decision under (a) that the measure was disproportionate; (d) that it rejected the author's appeal and considered that the author did not have the right to refuse the work and that the law provides for the reduction as applied.

2.7 Following the appeal, the Central Board of Appeal decided finally on 22 January 1998 to confirm the District Court decision of 4 July 1996.

The complaint

3.1 The author claims that his right to be compensated according to law for the unlawful punishment he was submitted to, not to be punished again for an offence for which he has already been finally punished, his right not to be punished for an act which did not constitute a criminal offence at the time when it was committed, his right not to be discriminated against on the basis of his age, his right to hold opinions without interference, and his right not to be subjected to inhuman treatment, have been violated.

3.2 The author claims that he was punished several times for the same act, in decisions of 25 September 1990, 5 January and 8 June 1993 by his employer, and that this was not repaired in spite of the Central Board of Appeal's ruling in his favour, in violation of article 14, paragraphs 6 and 7.

3.3 The author complains that the Central Board of Appeal by combining the penalty of dismissal with other penalties imposed a heavier penalty on him, than the one that was applicable at the time of the offence, in violation of article 15 of the Covenant.

3.4 The author claims to be a victim of a violation of article 26 or 5, paragraph 2 of the Covenant, since the court did not apply the legislation that protected him from the imposition of work when he had reached the age of 55, and it imposed a combination of penalties when it had been decided that the employee should resign from his position although prohibited by law.

3.5 The author claims that he was punished for neglect of duty and defamation for the act of writing a report complaining about how he had been treated by management, although the report was based on facts, and only sent to the municipality for which he was working, in violation of his right to freedom of expression under article 19, paragraph 2, of the Covenant.

3.6 The author claims that he was submitted to inhuman treatment by the Central Board of Appeal, which used his medical conditions to justify his dismissal, and by the court proceedings in general, which took so long that the proceedings themselves were inhuman, in violation of article 7 of the Covenant.

The State party's submission on the admissibility

4.1 By note verbale of 1 October 2001, the State party informed the Committee that it wished to challenge the admissibility of the communication.

4.2 The State party contends that the author has failed to exhaust domestic remedies, by not bringing the same claims before the domestic courts, which he now brings before the Committee. It claims that the author thereby has failed to comply with the admissibility criterion in article 2 of the Optional Protocol.

4.3 Furthermore, in respect of the author's claims under articles 14 and 15 of the Covenant, these articles do not apply to the author's case, since the author has not been prosecuted for the remarks he made in his report.

4.4 The State party further contends that the author under no circumstances has been exposed to inhuman or degrading treatment within the meaning of article 7 of the Covenant.

4.5 With regard to the author's claims of unequal treatment (article 26 of the Covenant), and freedom of expression (article 19 of the Covenant), the State party contends that the author has not advanced any relevant arguments to substantiate his claims.

4.6 The State party refers to the inadmissibility decision of the European Commission of Human Rights of 29 October 1998 in relation to the same matter, where the Commission after having studied the documents submitted by the author, concluded that "they do not disclose any appearance of a violation of the rights set out in the Convention and its Protocols". It claims that the communication should be declared inadmissible for non-substantiation, and refers in that regard to the Committee's jurisprudence in Cases Nos. 419/1990, 379/1989, 378/1989, 341/1988 and 329/1988.

Comments by the author

5.1 By letters of 20 November 2001 and 20 February 2002, the author commented on the State party's submission.

5.2 With respect to the State party's contention that he has failed to exhaust domestic remedies, the author argues that he brought his claims before the highest domestic court, and thereby exhausted domestic remedies.

5.3 With respect to the State party's objection that articles 14 and 15 of the Covenant do not apply to his case since he was not prosecuted for his remarks in the report, the author contends that he was, nevertheless, punished three times for the same act and imposed with a heavier punishment than what was provided by law, in violation of the said articles.

Issues and proceedings before the Committee

6. By decision of 12 February 2002, the Committee, acting through its Special Rapporteur on new communications, decided to separate the Committee's consideration of the admissibility and the merits of the case.

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.[3]

7.3 With regard to the author's claims that he was punished several times for the same act, in decisions of 25 September 1990, 5 January and 8 June 1993 by his employer, that this was not repaired in spite of the Central Board of Appeal's ruling in his favour, and that the Central Board of Appeal by combining the penalty of resignation with other penalties, imposed a heavier penalty on him, than the one that was applicable at the time of the criminal offence, in violation of articles 14, paragraphs 6 and 7, and 15 of the Covenant, the Committee notes that these articles of the Covenant relate to criminal offences, whereas in the author's case only disciplinary measures were imposed and the material before the Committee does not show that the imposition of these measures related to a "*criminal charge*" or a "*criminal offence*" in the meaning of article 14 or 15 of the Covenant. This part of the claim is therefore outside the scope of the Covenant, and inadmissible, *ratione materiae,* under article 3 of the Optional Protocol.

7.4 In respect of the fact that according to the decision of the Central Board of Appeal, the domestic law of the State party did not give the author, as a person who had reached the age of 55, the right to refuse new work assignments, the Committee notes that the author has not supported his contention to the contrary with any relevant materials or arguments. Consequently, the Committee finds that the claim under article 26 taken together with article 5, paragraph 2, is not substantiated for purposes of admissibility and is therefore inadmissible under article 2 of the Optional Protocol.

7.5 With regard to the author's claim under freedom of expression, the Committee notes that disciplinary or other sanctions against a municipal official for writing a critical report to his employer, when the latter considers the language as defamatory, could raise issues under article 19 of the Covenant. However, as all disciplinary sanctions imposed as a consequence of the author writing the report in question were later quashed by the courts of the State party, the Committee considers that the author has no remaining claim under article 19. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.6 With regard to the author's claim under article 7 of the Covenant, that he has been subjected to inhuman treatment following the Central Board of Appeal's decision on medical restrictions and his employer's failure to implement the Central Board of Appeal's decisions in his favour, the Committee finds that the author has not substantiated for the purposes of admissibility, how this treatment would raise an issue under article 7.

7.7 In the light of the conclusions reached above, the Committee need not address the State party's additional arguments against the admissibility of the communication.

8. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3, of the Optional Protocol;

(b) That this decision shall be communicated to the author, and, for information, to the State party.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Optional Protocol entered into force for the Netherlands on 10 December 1978.

[2] This is a Civil Service Court.

[3] The case was declared inadmissible by the European Commission of Human Rights on 29 October 1998.

U. Communication No. 1004/2001, *Estevill v. Spain*[*]
(Decision adopted on 25 March 2003, seventy-seventh session)

Submitted by:	Mr. Luis Pascual Estevill (represented by Mr. Javier Pascual Franquesa)
Alleged victim:	The author
State party:	Spain
Date of communication:	12 March 2001

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Luis Pascual Estevill, a Spanish national. In his communication of 12 March 2001, he claims to be the victim of a violation by Spain of article 14, paragraph 5, of the International Covenant on Civil and Political Rights. The author is represented by counsel.

The facts as submitted by the author

2.1 On 4 July 1996, the Supreme Court sentenced Mr. Pascual Estevill, a member of the General Council of the Judiciary, to six years' suspension from the exercise of judicial functions for breach of public trust in combination with two offences of unlawful detention.

2.2 The author submitted an application for *amparo* to the Constitutional Court, claiming violation of his right to effective legal protection and infringement of his right to due process, insofar as the judgement handed down by the Supreme Court, acting as court of first instance, denied the author access to other remedies. His application was turned down on 17 March 1997.

2.3 The author took his case to the European Commission of Human Rights, claiming (a) a violation of article 13 of the European Convention on Human Rights and (b) a violation of article 2, paragraph 1, of Protocol No. 7 to the Convention and of articles 14 and 15 of the International Covenant on Civil and Political Rights. In a decision dated 6 July 1998, the Commission declared the application "manifestly ill-founded" and consequently inadmissible.[1]

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir. Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The complaint

3. The author claims a violation of article 14, paragraph 5, of the Covenant on the grounds that the judgements of the Supreme Court are without remedy, i.e. that in criminal proceedings against protected persons the principle of sole instance applies, which means that, as in the author's case, the convicted person is denied access to the appeals machinery.

The State party's observations on admissibility

4.1 In its observations dated 15 October 2001, the State party notes that criminal proceedings have been taken against Luis Pascual Estevill on a number of charges since late 1994 in connection with his conduct as a judge.

4.2 The State party challenges the admissibility of the communication on the basis of the reservation to article 5, paragraph 2 (a), that it entered on depositing its instrument of ratification of the Optional Protocol to the Covenant, and contends that the reservation prevents the consideration of a matter which has been previously submitted to another international investigation or settlement. The State party claims that the reservation applies in the present case because the author submitted the same matter to the European Commission of Human Rights, which, having considered the author's complaint that he had no effective remedy against his sentence, concluded, in its ruling on inadmissibility, that since the author had submitted an application for *amparo* to the Constitutional Court, he had an effective remedy available before a domestic court.

4.3 The State party further considers that the communication should be declared inadmissible on the grounds that it constitutes an abuse of the right of submission, under article 3 of the Optional Protocol, since the author, who, as a former judge, undoubtedly has above-average legal qualifications, chose his own moment and submitted the communication 48 months after the final domestic judgement and 32 months after the European Commission's decision.

4.4 Lastly, the State party argues that it was the author himself who, given his position as member of the General Council of the Judiciary, insisted on being tried by the Supreme Court, which he considered the competent judicial body. Consequently, on 7 November 1994, he submitted a written application to the High Court of Catalonia for the criminal proceedings against him to be transferred to the Second Division of the Supreme Court. When that application was rejected, he submitted an application for reconsideration, which was also rejected by the High Court. Finally, on 14 November 1994, he submitted an application to the Supreme Court requesting it to assume jurisdiction to investigate and try him; the Supreme Court's response was to declare itself competent "in accordance with the request". To summarize, the State party argues that the author cannot call into question his own actions and complain to the Committee that he has been tried in sole instance by the Supreme Court, when in domestic procedures all his efforts were directed towards ensuring that he would in fact be tried by that Court and, having attained that objective, he submitted not the slightest complaint in that regard during the proceedings.

The author's comments on the State party's observations on admissibility

5.1 In his comments of 11 January 2002 in response to the State party's observations on admissibility, the author argued that the information provided by the State party concerning the criminal proceedings against him has no bearing on the grounds on which the claim of inadmissibility is based.

5.2 With regard to the State party's reservation, the author states that a matter may be brought before the Committee even if it has been submitted to the European Court of Human Rights provided that, as in this case, the Court has not considered the merits of the case. He claims that the Committee's case law is "constant" (sic) in holding that a matter has not been considered if an application under another international procedure has been declared inadmissible and has not been considered on the merits, and he refers to the Committee's Views in the case of *Casanovas v. France*.[2] He further claims that the decision on inadmissibility in his case was based on article 27, paragraph 2, of the European Convention, which reads as follows: "The Commission shall consider inadmissible any petition submitted under article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded or an abuse of the right of petition", which leaves no room for doubt that his case was not considered on the merits. Lastly, the author claims that his application for *amparo* to the Constitutional Court was also declared inadmissible, that therefore it was not considered on the merits and there was no review of the judgement handed down in first instance.

5.3 With regard to the inadmissibility of the communication under article 3 of the Optional Protocol, the author states that the article should be given a more restrictive interpretation than that applied by the State party. He also claims that requiring a given individual, as in this case, to subject himself to time frames in the light of personal and professional circumstances, is a violation of the principle of legality and equality, since the Optional Protocol sets no deadlines whatsoever for submission of a complaint to the Committee.

5.4 Lastly, the author informs the Committee that in Spain it is not the accused who chooses the courts but the courts that are stipulated by the law.[3]

The Committee's deliberations on admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The only complaint by the author is related to article 14, paragraph 5, of the Covenant, which stipulates that "Everyone convicted of a crime shall have the right to his conviction and sentenced being reviewed by higher tribunal." The Committee notes that the State party's legal system would have granted the right of appeal if the author had been tried by the High Court of Catalonia. However, it was the author himself who repeatedly insisted that he be tried directly by the Supreme Court. Bearing in mind that the author is a former judge with a great deal of experience, the Committee considers that, by insisting on being tried only by the Supreme Court, the author has renounced his right of appeal. The Committee considers that, in the circumstances, the allegation by the author constitutes an abuse of the right to submit communications, in accordance with article 3 of the Optional Protocol.

6.3 Consequently, the Committee does not deem it necessary to consider whether the submission of one and the same matter to the European Commission of Human Rights prevents consideration of the case in question on the basis of the State party's reservation concerning article 5, paragraph 2 (a), of the Optional Protocol.

7. Accordingly, the Committee decides,

(a) That the communication is inadmissible under article 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and the author.

[Adopted in Spanish, French and English, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Decision of the European Commission of Human Rights dated 6 July 1998 (No. 38224/97), in which it was held that Protocol No. 7 to the European Convention for the Protection of Human Rights could not be invoked by the author, since Spain had not ratified the Protocol.

[2] Communication No. 441/1990, *Casanovas v. France*, findings adopted on 19 July 1994.

[3] According to article 57, paragraph 1, of the Judiciary (Organization) Act of 6 July 1985, "The Criminal Division of the Supreme Court shall be competent to: (2) investigate and try cases against the President of the Government, the Presidents of the Congress and the Senate, the Presidents of the Supreme Court and of the General Council of the Judiciary, the President of the Constitutional Court, members of the government, Deputies and Senators, members of the General Council of the Judiciary (…)."

V. Communication No. 1013/2002, *Boboli v. Spain** (Decision adopted on 30 July 2003, seventy-eighth session)

Submitted by:	Jacek Boboli
Alleged victim:	The author
State party:	Spain
Date of communication:	19 August 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 July 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication dated 19 August 1997 is Jacek Boboli, a Belgian citizen residing in Zaragoza, Spain, who claims to be a victim of violations by the Spanish State of articles 14 and 26 of the International Covenant on Civil and Political Rights.[1] He is not represented by counsel. The Optional Protocol to the Covenant entered into force for Spain on 25 January 1985.

The facts as submitted by the author

2.1 As a result of disputes arising out of breaches of contracts concluded with various transport companies, the author filed a suit with the Zaragoza Transport Arbitration Board, which handed down an arbitral award (No. 59/93) on 6 October 1993 that was contrary to the author's interests. On 29 November 1993, the Board also handed down three decisions in which it declared that it was not competent to settle some of the author's disputes.

2.2 The author filed an appeal against arbitral award No. 59/93. On 27 May 1994, section V of the Zaragoza Provincial High Court rejected his appeal and so notified him on 1 June 1994. The author mailed an application for *amparo* against this ruling that was registered as No. 2261/94. On 30 January 1995, the Second Chamber of the Constitutional Court declared the application inadmissible on the grounds that it had been submitted late, arguing that the author had had 20 days as from the day following the date of the notification of the Provincial High Court's ruling in which to file an application for *amparo* and that the deadline had passed.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 The author states that the date of delivery of the application to the porter of the Court indicated in the postal acknowledgement of receipt is Friday, 24 June 1994, the last day on which to file an application. However, the application reached the Constitutional Court on Monday, 27 June,[2] as shown by the court's registry stamp.

2.4 With regard to the three decisions handed down by the Zaragoza Transport Arbitration Board on 29 November 1993, the author also appealed to Zaragoza Court of First Instance No. 1, which rejected the appeal in a ruling dated 2 June 1994. The author therefore appealed to the Second Section of the Zaragoza Provincial High Court, which rejected his appeal on 23 January 1995. The procurator (*procurador*) in the case was notified of the decision on 24 January 1995.

2.5 According to the author, neither the procurator nor the legal aid notified him of the decision. He states that he tried on a number of occasions to contact his lawyer, without success, and that it was not until 28 February 1996 that he learned that she no longer worked in the same office and that a ruling had been handed down against him some time earlier. He requested a copy of the ruling from the Provincial High Court and received it by mail on 7 May 1996.

2.6 On 29 May 1996, the author filed another application for *amparo* (registered as No. 2214/96) with the Second Chamber of the Constitutional Court, which rejected it on 30 September 1996 on the grounds of late submission.

2.7 The author submitted a complaint against the procurator, María Dolores Sanz Chandro, and the lawyer, María Pilar España Bardají, to the governing body of the Association of Procurators and to the Royal Association of Lawyers. The former agreed on 22 May 1996 that the procurator had acted properly from the standpoint of professional ethics and recommended shelving the record of proceedings. The latter agreed on 18 April 1996 to the discontinuance of proceedings and shelving of the case.

2.8 The author appealed to the General Council of Procurators, which on 5 December 1996 decided that the procurator's action had been valid and consistent with the law.

2.9 The author also requested action by the Ombudsman, who informed him on 15 July 1996 that relations between him and his lawyer and procurator were of a legal-private nature and that the Ombudsman's Office therefore lacked competence to intervene.

2.10 In respect of the decision by the General Council of Procurators, the author applied on 28 October 1997 for an administrative remedy from the Ninth Section of the Administrative Chamber of the Madrid Superior Court of Justice on which a decision has still not been taken.

The complaint

3.1 The author claims a violation of the right to an effective legal remedy, as provided for in article 14, paragraph 1, on the grounds that the rejection of the application for *amparo* registered as No. 2261/94 against the ruling by Section V of the Zaragoza High Court was the result of the fact that the application reached the Constitutional Court three days after it was sent by mail and was therefore registered after the deadline.

3.2 The author also claims a violation of the right to equality before the law, as provided for in article 26 of the Covenant, on the grounds that the foregoing facts establish territorial discrimination because private individuals who do not live in Madrid have to go there and submit an application in person, since that is the only way of making sure that such application will undergo the legal procedure before the deadline.

3.3 In addition, the author claims that the procurator imposed by the Aragón Superior Court of Justice did not fulfil her obligations because she did not communicate the ruling by the Second Section of the Zaragoza Provincial High Court to the author, with the result that the Constitutional Court rejected application for *amparo* No. 2214/96 on the grounds of late submission. According to the author, that was not his fault and it was a violation of his right to an effective judicial remedy, as provided for in article 14 of the Covenant.

Observations by the State party on admissibility and the merits

4.1 In its comments on admissibility of 25 October 2001, the State party argues that the rejection of application for *amparo* No. 2261/94 on the grounds of late submission was in conformity with the law because the application was submitted after the 20-day time limit for applications for *amparo* and that the communication is therefore inadmissible.

4.2 The State party also affirms that, in accordance with article 238,[3] paragraph 1, of the Judicial Power Organization Act, procedural legal certainty is what determines that the date of the receipt of documents by court secretariats is the date that must be taken into account. The State also claims that Mr. Boboli did not supply evidence that he sent the application on 21 June 1994 or that it was received by the Constitutional Court on 24 June 1994. The only thing shown in the file is that the application was received on 27 June 1994.

4.3 The State party also requests that the author's complaint should be declared inadmissible because of the rejection of application for *amparo* No. 2214/96 on the grounds of late submission, arguing that the rejection was in keeping with article 43, paragraph 2, of Constitutional Court Organization Act No. 2/1979. The State party affirms that the court ruling referred to in the application was communicated to Mrs. Sanz Chanero, Mr. Boboli's legal representative, on 24 January 1995 and that the application for *amparo* was not filed until 27 May 1996, i.e. one year and four months later, whereas the time limit for an application for *amparo* is 20 days.

4.4 The State party also indicates that, according to article 6 of the Civil Proceedings Act, "The procurator shall consider and sign notifications of all kinds, including decisions, which must be addressed to the party concerned during the proceedings, such steps having the same legal validity as if the principal had taken them himself."

4.5 The State party maintains that Mr. Boboli's legal representative was properly notified of the court ruling in question and that, once she was so notified, she sent it to the author and his lawyer and none of these letters was returned by the postal service; in addition, Mr. Boboli explicitly admitted that the letter sent to the lawyer reached the addressee.

4.6 The State party also says that it is the established practice of the Constitutional Court and the European Court of Human Rights that the notification which is valid for the purpose of calculating the deadline for the filing of an application for *amparo* is the notification to the procurator, the author's legal representative.

4.7 The State party affirms that the author has not exhausted domestic remedies, since there is no indication that he instituted liability proceedings of any kind against the procurator and, according to article 442 of the Judicial Power Organization Act,[4] "In the exercise of their functions, procurators may incur civil, criminal and disciplinary liability, as appropriate."

4.8 In the comments on the merits it made on 12 March 2002, the State party stresses that application for *amparo* No. 2261/94 was duly rejected because it was submitted late and that the author contradicts himself by stating in his communication that he sent the application by registered mail on 21 June 1994, since the date which appears at the end of the application is 22 June 1994.

4.9 With regard to the sender's postal receipt and the acknowledgment of receipt submitted by the author, the State party says that the photocopy is illegible and that the writing and the type of pen used for the date and for the addressee's name, signature and national identification document number are different. There is also no postal service stamp, whereas the two stamps and the writing in the Constitutional Court's registry are quite clear.

4.10 As to application for *amparo* No. 2214/96, the State party emphasizes that the procurator was notified of the court ruling and sent it to the author and also that domestic remedies were not exhausted.

Comments by the author on the State party's observations on admissibility and the merits

5.1 In his letter dated 28 November 2001, the author maintains that his application for *amparo* reached the Constitutional Court by the deadline and argues that holidays should not be counted. He submits copies of the sender's receipt and the acknowledgment of receipt which were made available to him by the Spanish postal service and which show that he sent a document on 23 June 1994 that was received by court officials the following day.

5.2 He alleges that the "legal certainty" referred to by the State party does not provide protection for persons who would like to file an application for *amparo* with the Constitutional Court and who live in parts of the national territory far from Madrid.

5.3 He says that, by not having accepted the application for *amparo*, the Constitutional Court caused him serious harm, especially as it sided with the applicant in a case similar to the one dealt with in his application.

5.4 With regard to the rejection of application for *amparo* No. 2214/96, the author argues that the notification of the ruling was not returned by the postal service because it was never sent and that there is also no proof of the genuineness of the originals of the copies the procurator allegedly used to confirm that the notification was sent, since they could have been drafted at any time.

5.5 In his letter of 25 May 2002, the author refers to the State party's comments as to the merits, arguing that the date that must be taken into account for the deadline for filing an application for *amparo* must be the date on which the Constitutional Court received the application, not the date on which the application was sent, although according to the author this is unfair.

5.6 In respect of the State party's argument that the court's stamp does not appear on the sender's postal receipt and the postal acknowledgement of receipt, the author alleges that the Constitutional Court's stamps never appear on acknowledgements of receipt and, as evidence, he puts forward several which relate to cases other than his own. In connection with the State party's observation on the two types of writing and pens used in those documents, the author states that this is normal, since the boxes are intended for two different persons: the addressee and the postal employee.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

6.2 The Committee has ascertained that, under article 5, paragraph 2 (a), of the Optional Protocol, the same matter is not being examined under another procedure of international investigation or settlement.

6.3 With regard to the applicant's allegation that application for *amparo* No. 2261/94 was improperly rejected by the Constitutional Court, the Committee notes that article 135 of the Civil Proceedings Act[5] provides that the place for the submission of documents is the secretariat of the court, which must issue a receipt indicating the date and time of the submission of the documents, the purpose of which can be interpreted as serving as proof when there is a time limit, as in the present case. However, even where this provision allows the use of means of sending and normally receiving documents, including documents sent by mail, it also states that this must be done in such a way that "the authenticity of the communication is guaranteed and there is reliable evidence of the sending and receipt of the documents in full and of the date on which they were sent and received".[6] On the basis of the information available to the Committee, it thus appears that the only date indicating receipt of the application for *amparo* is that of general registration in the Constitutional Court on 27 June 1994. Because there is insufficient evidence to substantiate the admissibility of the complaint, this part is therefore declared inadmissible under article 2 of the Optional Protocol.

6.4 With regard to the alleged violation of the right to equality before the law, as provided for in article 26 of the Covenant, the Committee notes that the complaint relates not to one case in particular, but to civil procedure in Spain or, in other words, to a system of law in general. The Committee therefore considers that, for the purposes of admissibility, the author has not substantiated his allegation of a violation of article 26 of the Covenant as required by article 2 of the Optional Protocol.

6.5 As to the alleged violation of the right to an effective judicial remedy as a result of the alleged breach of their obligations by the procurator and the author's legal aid, the Committee notes that the author filed an administrative remedy with the Superior Court of Justice against the agreement of the General Council of Procurators. However, the file does not show that this remedy has been ruled on. Because it is still under consideration and therefore does not meet the requirements of article 5, paragraph 2 (b), of the Optional Protocol, this part of the complaint is inadmissible.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the author of the communication and to the State party.

[Done in Spanish, French and English, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The author, who is not represented by counsel, does not base his claim on these articles; the reference was supplied on the Secretariat's initiative.

[2] The interpretation, *sensu contrario*, of article 182 of the Judicial Power Organization Act and article 130 of the Civil Proceedings Act must be that Saturday is a working day: "Non-working days are Sundays, national holidays and other holidays in the respective autonomous communities or localities."

[3] The text of article 238 of the Judicial Power Organization Act relates to "the invalidity of judicial acts" and has no bearing on what the State party was referring to: "Judicial acts shall be invalid in the following cases: 1. When they take place with an obvious lack of objective or functional jurisdiction; 2. When they involve violence or are carried out under a rational and well-founded threat of serious and imminent harm; 3. When the basic rules of procedure established by law are completely and totally ignored or the principles of a fair trial, assistance and defence are violated, provided that there has actually been a breach of the right of defence."

[4] Organization Act No. 6/1985 of 1 July 1985.

[5] Article 135: "Submission of documents for the purposes of the time limit for procedural acts. 1. When the submission of the document is subject to a time limit, it may be submitted within 15 days of the working day following that of the expiration of the time limit, at the secretariat of the court or, as appropriate, at the central registry office, if one has been established; 2. In proceedings before the civil courts, the submission of documents shall not be allowed in the duty magistrate's court; 3. Court secretaries or officers appointed by them shall

take steps to have confirmed the date and time of submission of applications and documents, initiation of the procedure and any other submission which is subject to a specified deadline; 4. In any event, the party shall receive a receipt for any documents he submits, with an indication of the date and time of submission. The receipt of photocopies of documents submitted by the party may also be recorded."

[6] Article 135: "5. When the courts and the parties to proceedings have technical means at their disposal for sending and receiving documents so that the authenticity of the communication is guaranteed and there is reliable evidence of the sending and receipt of documents in full and of the date on which they were sent and received, documents may be sent by such means."

W. Communication No. 1021/2002, *Hiro Balani v. Spain*[*]
(Decision adopted on 25 March 2003, seventy-seventh session)

Submitted by:	Rita Hiro Balani (represented by counsel Mr. Juan Carlos Lara Garay)
Alleged victim:	The author
State party:	Spain
Date of communication:	23 October 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication dated 23 October 1998 is Rita Hiro Balani, who at the time of the events was an Indian national, and subsequently obtained Spanish citizenship. She claims to be the victim of a violation by Spain of articles 14 and 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel. The Optional Protocol to the Covenant entered into force for Spain on 25 January 1985.

The facts as submitted by the author

2.1 In 1985 the Japanese "*Orient Watch Co. Ltd.*" filed a claim with Court of First Instance No. 8 in Madrid against the Spanish "*Orient H. W. Balani Málaga*" trademark, alleging that under the Paris Convention for the Protection of Industrial Property, the registration in Japan in 1951 of its trade name gave it ownership of that name in all States parties to the Convention - including Spain - and protected it against subsequent registration of any identical or similar trademark. Ms. Hiro Balani opposed the claim filed by the Japanese company, alleging that the period of three years in which to file such claims had passed, and that that had the legal effect of "establishing" her trademark, while the trade name "*Orient Watch Co. Ltd.*" was not genuine, as a "*Creaciones Oriente*" trademark had already existed, had been registered in 1934 and had been transferred to the Japanese company in 1984.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 By a judgement dated 9 May 1988, the Madrid Audiencia Territorial accepted the "establishment" as claimed by the author. In a judgement of 30 April 1990 the Supreme Court held, on the contrary, that there had been no "establishment" of the trademark, as its registration had been void.

2.3 The author filed an *amparo* appeal against this judgement and on 29 October 1990 the Constitutional Court rejected the appeal.

2.4 The author later appealed to the European Court of Human Rights, which on 9 December 1994 found that Spain had violated article 6, paragraph 1, of the European Convention on Human Rights, corresponding to article 14 of the Covenant, because the established safeguards were not applied during the civil proceedings annulling the trademark registered by the author. The author requested that the Supreme Court's decision against her should be overturned. In a judgement dated 23 April 1997, the Constitutional Court rejected the request, holding that the author, by filing an appeal contending that the Supreme Court's ruling was void, had used an inappropriate channel, as she should have filed an *amparo* appeal within 20 days of notification by the Supreme Court, and that in the Spanish legal system, adverse decisions by the European Court of Human Rights had only declaratory weight in civil proceedings. The sole exception would be if the European Court had found that fundamental rights had been violated "*in the criminal field*".

2.5 As a precedent, the author refers to the case of *Barberá, Messegué and Jabardo*, for which the European Court of Human Rights had issued a judgement[1] determining that Spain had violated article 6, paragraph 1, of the European Convention on Human Rights during the trial of these three individuals accused of committing a terrorist act. The Constitutional Court, in a ruling dated 16 December 1991, annulled the judgement of the Supreme Court and ordered proceedings in the case to be resumed at the point when the right to legal protection had been violated.

The complaint

3.1 The author claims a violation of article 14 of the Covenant, which establishes that all persons shall be equal before the courts and tribunals. She argues that the Constitutional Court ascribed different force to the two rulings of the European Court of Human Rights, since it refused to order a fresh ruling in her case, but not in the case of *Barberá, Messegué and Jabardo* on which the European Court had ruled.

3.2 The author further alleges a violation of article 26 of the Covenant, according to which all persons are equal before the law and are entitled without any discrimination to the equal protection of the law, as the Constitutional Court did not afford equal treatment to the defendants in the *Barberá, Messegué and Jabardo* case and to her.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 As regards the author's allegations concerning the violation of article 14 of the Covenant, to wit that the Constitutional Court violated this rule by refusing to order a fresh judgement in the case of the "*Orient H. W. Balani Málaga*" trademark, the Committee observes that these allegations by the author have not been sufficiently substantiated to be admissible. Consequently, this aspect of the communication is inadmissible under article 2 of the Optional Protocol.

4.3 As regards the author's allegations concerning the violation of article 26 of the Covenant, arguing that the Constitutional Court did not afford equal treatment to the European Court of Human Rights' rulings on her case and on *Barberá, Messegué and Jabardo*, the Committee refers to its constant jurisprudence according to which the right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.

4.4 In this regard, the Committee observes that the Constitutional Court noted in its judgement of 23 April 1997 that "*adverse decisions by the European Court of Human Rights are, in principle, of merely declarative value. The only exception allowed would be if that Court found that a violation of rights in the criminal field had taken place - a violation, what is more, whose effects must be current when enforcement of the judgement is material. In the present case, on the other hand, we have a ruling by the European Court of Human Rights which finds a violation of article 6, paragraph 1, of the Convention in civil proceedings, proceedings which resulted in a judgement by the Supreme Court that obviously in no way affects the freedom of the author. Hence there are none of the special circumstances required by STC 245/1991 to justify an exception to the general principle under which adverse decisions by the Strasbourg Court are declarative in nature.*" Consequently, the Committee considers that the arguments provided by the author are not sufficient to substantiate her complaint for the purposes of admissibility, as it does not establish that the State party afforded her discriminatory treatment or unequal protection under the law. The communication is therefore inadmissible under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this communication shall be communicated to the author and, for information to the State party.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] Case 24/1986/122/171-173 of 6 December 1988.

X. Communication No. 1038/2001, *Ó Colchúin v. Ireland**
(Decision adopted on 28 March 2003, seventy-seventh session)

Submitted by:	Dáithi Ó Colchúin
Alleged victim:	The author
State party:	Ireland
Date of communication:	3 July 2000

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 2002,

Adopts the following:

Decision on admissibility

1. The author of the communication is Daithi Ó Colchúin, an Irish citizen, born 22 April 1946. He claims to be a victim of violations by the Republic of Ireland of articles 2, 25 and 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

The facts as submitted by the author

2. The author, being ordinarily resident outside of Ireland (Australia) is unable to vote in elections for the Irish Parliament, for the Presidency and in referenda. The author is so restrained from voting in Dáil (Lower House of Parliament) elections by direct operation of section 8, of the Electoral Act 1992, which provides, in order for registration in a constituency as an elector, that a person must have reached the age of 18, be an Irish national, and ordinarily resident in that constituency. All constituencies are within the State, and there are no provisions to vote from abroad except for certain immaterial exceptions. The right to vote in presidential elections and in referenda is derived from the right to vote in Dáil elections.

The complaint

3.1 The author claims that this exclusion prevents many Irish nationals abroad, including himself, on the basis of their residency, from participating in political affairs in accordance with article 25. He argues that article 25 confers a right to vote on "every citizen".

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

3.2 The author also claims that the exclusion is discriminatory and breaches his right to equality before the law under articles 2 and 26. The author refers to paragraph 8 of the Committee's general comment No. 23 in which it states that access to equal rights does not mean "identical treatment in every instance". It also states that article 25 "guarantees certain political rights, differentiating on grounds of citizenship". The author argues that the Electoral Act, 1992, does not differentiate on grounds of citizenship but between two different groups of citizens on the basis of residential status. He claims that it discriminates between people born in Ireland who are resident within the State and people born in Ireland who are resident outside the State.

3.3 As to the admissibility of the communication, the author states that the pursuit of domestic remedies would be prohibitively expensive, having received an estimate from counsel that pursuit of the case before the domestic courts would total "anything from about £20,000 to £100,000" (approximately EUR 25,400 to 127,000). However, he states that he has lobbied legislators without any results.

The State party's submissions on admissibility

4.1 By note verbale of 13 March 2002, the State party submits that this communication is inadmissible *ratione loci* and for failure to exhaust domestic remedies. The State party submits that it is inadmissible *ratione loci* because the author is neither within the territory of Ireland nor is he subject to Irish jurisdiction, for the purposes of article 2, paragraph 1, of the Covenant and article 1 of the Optional Protocol thereto. It submits, therefore, that it is not obliged under article 2 of the Covenant to ensure to the author all the rights recognized in the Covenant and the Committee is not competent to receive and consider the communication under article 1 of the Optional Protocol.

4.2 The State party submits that this communication may be distinguished from other communications in which the author was physically outside the territory, but where the Committee found that he was subject to the jurisdiction. The situation of the author in this case is not comparable to that of the author in *Montero v. Uruguay*,[1] where the communication concerned the refusal of the Uruguayan authorities to renew the author's passport. The Committee in that case stated that, "The issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is 'subject to the jurisdiction' of Uruguay for that purpose."[2] According to the State party, it is implicit in the use of the words "for that purpose" that a citizen who is not physically within the territory of a State is not "subject to its jurisdiction" for all purposes.

4.3 The State party also refers to the Committee's decisions in *Lopez Burgos v. Uruguay*[3] and in *Celiberti de Casariego v. Uruguay*[4] to support the proposition that where a citizen is outside the territory of the State and his rights are deliberately violated by agents of the State, the State may not avoid its obligations under the Covenant merely because the violation was carried out outside the territory of the State. In an individual opinion, appended to the Committee's Views on each of these communications, Mr. Christian Tomuschat observed that it was not envisaged, "... to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad". The State party submits that the communication herein does not fall within this category of cases.

4.4 The State party also refers to the Committee's decisions on issues concerning extradition or expulsion. If a State party extradites or deports a person within its territory and subject to its jurisdiction in such circumstances that, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant.[5] In the State party's view, no comparison may be drawn between the instant communication and such cases involving extradition or deportation.

4.5 The State party draws the Committee's attention to the recent case of *Bankovic and Others v. Belgium*[6] heard by the European Court of Human Rights in which the judgement states that "... it is difficult to suggest that the exceptional recognition by the Human Rights Committee of certain instances of extraterritorial jurisdiction ... displaces in any way the territorial jurisdiction expressly conferred by that article of the CCPR 1966 or explains the precise meaning of 'jurisdiction' in article 1 of its Optional Protocol 1966 ...". The State party submits that this interpretation of article 2, paragraph 1, of the Covenant and article 1 of the Optional Protocol is correct. The Court cited examples of extraterritorial acts recognized as constituting an exercise of jurisdiction, namely extradition or expulsion of a person by a Contracting State, acts of the authorities of a Contracting State which produced effects or were performed outside their own territory or where a Contracting State, as a consequence of military action, exercised effective control of an area outside its national territory. The Court also noted other situations where "... customary international law and treaty provisions have recognized the extraterritorial exercise of jurisdiction by the relevant State". The State party submits that none of the examples alluded to in this judgement corresponds to the situation of which the author complains.

4.6 The State party submits that the instant case does not justify extending the recognition of extraterritorial jurisdiction. It argues that in order to qualify as a victim of a violation of article 25, an individual must be within the territory and subject to the jurisdiction of a State party and must be a citizen of that State party. The requirement of citizenship in article 25 is additional to the territorial and jurisdictional requirements, and not an exception to them. This interpretation, the State party argues, is supported by the *travaux préparatoires* of the Covenant.[7]

4.7 The State party additionally submits that this case is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol, because the author has failed to exhaust all available domestic remedies. In fact, the author has not taken any judicial proceedings in the Irish Courts. He has not claimed that such proceedings would be futile, nor could he. The author has made no attempt to challenge the constitutionality of the provision in question in the Irish Courts on the grounds set out by the author, nor has the question of its compatibility with the Covenant or any other international human rights instrument been raised in the Irish Courts.

4.8 According to the State party, it was open to the author to challenge the validity of section 8 of the Electoral Act 1992 under the following Constitutional provisions. The right to vote at elections for members of Dail Eireann is governed by article 16.1.2 of the Constitution, which provides:

> "(i) All citizens, and
>
> (ii) Such other persons in the State as may be determined by law, without distinction of sex who have reached the age of eighteen years who are not disqualified by law and comply with the provisions of the law relating to the election of members of Dail Eireann, shall have the right to vote at an election for members of Dail Eireann."

Article 40.1 of the Constitution provides:

> "All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

4.9 According to the State party, the author's only attempt to address the alleged violation was by "political lobbying of legislators". The State party refers to the Committee's constant jurisprudence that an author must make use of all judicial or administrative avenues that offer him a reasonable prospect of redress.[8] The State party recollects that the rationale behind the necessity to exhaust domestic remedies[9] is to give the State party an opportunity to address the alleged violation of the author's rights before the Committee is seized of the matter. In the State party's view, political lobbying does not enable the State to examine individual complaints in the way a legal action does. It cannot lead to any legal determination that an individual's rights have been violated.

4.10 The State party notes that the author has conceded that he has not exhausted all available domestic remedies. The reason he gives for this is that he does not have the means to do so. The State party submits that the Committee should follow its decision in *P.S. v. Denmark*,[10] where it stated that "financial considerations and doubts about the effectiveness of domestic remedies do not absolve the author from exhausting them". The author has merely contacted one solicitor and made no further attempts to find any other lawyer to take on his case, nor does he appear to have made efforts to seek legal aid or to accumulate the money required to pursue his case. The State party refers to *G. T. v. Canada*,[11] in which the Committee noted that the author appeared "... to have made no effort to apply for legal aid under the Ontario Legal Aid Act" and concluded that the author had not met the requirement of exhaustion of domestic remedies. The State party submits that the statement quoted above is equally true of the author herein in this case that, accordingly, this communication should be inadmissible.

4.11 The State party submits that it is possible to seek legal aid in its jurisdiction in order to pursue a case of this nature. In particular, it was open to the author to seek legal aid under section 27 of the Civil Legal Aid Act 1995. The State party submits that as the only information provided by the author on his financial circumstances is that he is currently unemployed, the question of his financial eligibility under the 1995 Act and the Civil Legal Aid Regulations 1996 cannot be addressed. However, although it cannot be conclusively stated that the author would have received legal aid, had he applied for it, the author does not appear to have even made any attempt to apply for legal aid.

4.12 According to the State party, in addition or as an alternative to seeking aid under the 1995 Act, the author could have sought legal aid through the Free Legal Advice Centres (FLAC). These centres receive an annual grant from the State and provide legal services to persons in need, through one lawyer engaged on a salaried basis and others who give their time voluntarily. There are no restrictions as to the type of cases which FLAC may take. In fact, FLAC brings test cases to court challenging existing legislation with a view to bringing about amendments to the law for the benefit of everyone affected. It is not known whether FLAC might consider it appropriate to take a case like that of the author as a test case, as the author does not appear to have made contact with them.

4.13 The State party also brings to the attention of the Committee a further potential source of legal aid, under the Human Rights Commission Act 2000, which has become available since the author submitted this communication. The 2000 Act sets up a Human Rights Commission, which was established on 25 July 2001. This Act now provides a further potential source of legal aid to a person in the author's position. While it is impossible to predict what the outcome of an application to the Human Rights Commission for assistance might have been, it was open to the author, since 25 July 2001, to make such an application.

Comments by the author

5.1 By letter of 18 May 2002, the author submitted the following comments on the State party submission. On the State party's argument of inadmissibility, *ratione loci*, the author submits that it is entirely within the State's jurisdiction to decide which Irish citizens and which, if any, non-citizens, are entitled to vote in Irish elections regardless of country of residence. Citizens who live outside the State participate already in Irish elections in two ways. Firstly, citizens who have become resident in another State are eligible to vote in Dail elections for up to 18 months. Secondly, citizens who are graduates of two particular universities (National University of Ireland and University of Dublin) are eligible to vote in elections for the Senate (Upper House of Parliament) elections. The author argues that, as he has been voting in Senate elections since 1993 from his Australian address, this demonstrates that he is subject to the jurisdiction of Ireland for the purposes of voting. In addition, the author states that in many other democratic countries, provision is made for non-resident citizens to vote in their countries' elections and such non-citizens are therefore subject to the State's electoral laws.

5.2 On the State party's argument that the author has not exhausted domestic remedies, the author reiterates that the failure to proceed on this issue through the Irish legal system was due to estimates he received from two lawyers[12] demonstrating that the costs of such proceedings would be prohibitive. For this reason, in the author's view, these proceedings were not "available" to him as required by article 5, paragraph 2 (b), of the Optional Protocol. The author refers to the Committee's decisions in *Thomas v. Jamaica*[13] and *Currie v. Jamaica,*[14] in which the Committee found that the failure to file a constitutional motion to the Supreme Court of Jamaica owing to lack of financial means and the unavailability of legal aid was not an obstacle to admissibility.

5.3 On the issue of legal aid, the author states that to be eligible for assistance under the 1995 Civil Legal Aid Act, disposable income must be less than EUR 12,697.38. He states that as his disposable income is above this figure he would not be eligible. With respect to the possibility of receiving legal aid from the FLAC, the author states that he made such a request and was informed by e-mail in May 2002 that the organization would be unable to assist him on this issue.

5.4 Finally, on the possibility of receiving financial assistance from the Human Rights Commission, the author says that this Commission was not established until 25 July 2001, one year after his initial application to the Human Rights Committee and is therefore irrelevant for the question of admissibility.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes that the author's communication challenges his inability to participate in certain elections in the abstract, i.e. without reference to any particular elections where the author would have been prevented from exercising his right to vote. Consequently, the Committee finds that the author cannot claim the status of a "victim", within the meaning of article 1 of the Optional Protocol, of an alleged violation of any of his Covenant rights, and the communication is accordingly inadmissible under article 1 of the Optional Protocol.

7. Accordingly, the Committee decides:

(a) That the communication is inadmissible;

(b) That the State party and the author should be informed of this decision.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Case No. 106/1981, Views adopted on 31 March 1983.

[2] Ibid. at para. 5.

[3] Case No. 52/1979, Views adopted on 29 July 1981.

[4] Case No. 56//1979, Views adopted on 29 July 1981.

[5] The State party refers to *Ng v. Canada* Case No. 469/1991, Views adopted on 5 November 1993, and *T. v. Australia* Case No. 706/1996, View adopted on 4 November 1997.

[6] Application No. 52207/99, judgement of 12 December 2001.

[7] As support for this proposition, the State party simply refers to the following comment: "There was general agreement that, notwithstanding the provisions of article 2, paragraph 1, restrictions placed in certain substantive articles of part III of the Covenant such as article 23, on

political rights, which refers to 'every citizen' would apply". E/CN.4/SR.125, p. 12, in M.J. Bossuyt: Guide to the "*Travaux Préparatoires*" of the International Covenant on Civil and Political Rights, 1987, Martinus Nijhoff Publishers: Dordrecht.

[8] The State party refers to *R.T. v. France* Case No. 262/1987, Decision adopted on 30 March 1989, and *Patiño v. Panama* Case No. 437/1990, Decision adopted on 21 October 1994.

[9] The State party refers to *T.K. v. France* Case No. 220/1987, Decision adopted on 8 November 1989, in which it was stated that "The purpose of article 5, paragraph 2 (b), of the Optional Protocol is, inter alia, to direct possible victims of violations of the provisions of the Covenant to seek, in the first place, satisfaction from the competent State party authorities and, at the same time, to enable States parties to examine, on the basis of individual complaints, the implementation, within their territory and by their organs, of the provisions of the Covenant and, if necessary, remedy the violations occurring, before the Committee is seized of the matter."

[10] Case No. 397/1990, Decision adopted on 22 July 1992.

[11] Case No. 420/1990, Decision adopted on 23 October 1992.

[12] The author refers to a second lawyer for the first time in his comments on the State party's submissions.

[13] Case No. 321/1988, Views adopted on 19 October 1993.

[14] Case No. 377/1989, Views adopted on 29 March 1994.

Y. Communication No. 1049/2002, *Van Puyvelde v. France**
(Decision adopted on 26 March 2003, seventy-seventh session)

Submitted by:	Philippe Van Puyvelde
Victim:	The author
State party:	France
Date of communication:	31 December 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 March 2003,

Adopts the following:

Decision on admissibility

1. The author is Mr. Philippe Van Puyvelde, a French citizen born on 20 March 1960 in Bergerac, France. He claims to be the victim of violations by France of, inter alia, articles 14, 15, 16, 17 and 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

The facts as submitted by the author

2.1 The author mentions four cases before a family court judge and two criminal cases involving him.

Cases before the family court judge

2.2 In a judgement dated 11 March 1997, the family court judge of the Carcassonne regional court dissolved the marriage between Ms. F. Zink and the author, with fault ascribed exclusively to the author, and ruled that the children's habitual place of residence should be the mother's home. The judge also ordered the author to pay maintenance of 400 francs a month towards the upkeep and education of the two children, noting that the author "does not object to this extremely reasonable request [from the mother], which should therefore be granted".

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 The author appealed against the judgement, which was upheld by the Montpellier appeal court on 30 October 1997.

2.4 Once the divorce had been granted, various proceedings were conducted to deal with measures concerning the children (parental authority and maintenance).

Application by the author to have the children's habitual place of residence changed (file No. 98/00312)

2.5 On 23 February 1998, the author applied to the family court judge to have his home declared the children's place of residence.

2.6 The author was assisted by a lawyer assigned to him under the legal aid scheme.

2.7 In an order dated 2 July 1998, the family court judge appointed a psychologist to look into the matter. The psychologist concluded that the interests of the children were best served by maintaining the current situation. In an order dated 2 November 1998, the family court judge dismissed the author's application.

Application by the author to have the maintenance order rescinded or modified (file No. 2000/00904)

2.8 On 2 May 2000, the author brought proceedings against Ms. F. Zink with a view to having the maintenance order rescinded on the grounds of persistent insolvency and the criminal proceedings against him for wilful desertion of his family.

2.9 The two parties attended a hearing on 6 July 2000. The author was assisted by a lawyer assigned to him under the legal aid scheme.

2.10 In an order dated 15 September 2000, the family court judge dismissed the author's request on the grounds that: (a) the author had never paid what was merely a token amount of maintenance, despite claiming to be a responsible father; (b) his fear of being punished for wilful desertion of his family did not constitute grounds for rescinding the maintenance order, as the author had been taking a calculated risk since 1997 in flouting the law and not requesting any change in his maintenance obligations, and he alone should suffer the consequences; (c) while the author's financial situation was modest, the fact remained that his children's essential needs had not diminished since 1997 and that he had produced no evidence that he had been very active since then in looking for a job which paid at least the statutory minimum wage and which would enable him to fulfil his maintenance obligations; and (d) under the law, parents with parental authority had rights and duties with respect to custody, supervision, education and, first and foremost, maintenance. The law attached particular importance to the duty to provide maintenance: article 373 of the Civil Code actually specified that fathers or mothers who, inter alia, had been found guilty of wilful desertion in one of its various forms were forbidden from exercising, or were temporarily stripped of, parental authority until at least six months had passed since they had resumed compliance with their obligations.

Application by the author's ex-wife to have the visiting rights and staying access modified (file No. 2001/00925)

2.11 On 18 June 2001, Ms. F. Zink applied to the family court judge to have the father's visiting rights and staying access modified.

2.12 The parties were assisted by a lawyer in the course of these proceedings.

2.13 On 18 September 2001, the family court judge modified the father's staying access and visiting rights. The judge also dismissed the author's application to have the maintenance order rescinded, pointing out that there had been no change in circumstances since the previous decision.

Criminal cases

2.14 The author mentions two criminal cases against him for wilful desertion of his family.

First set of proceedings for wilful desertion (file No. 99/00046)

2.15 On 8 February 1998, Ms. F. Zink lodged a complaint against the author for non-compliance with the maintenance order of 11 March 1997.

2.16 The author attended the hearing before the criminal court in Carcassonne on 28 October 1998, where he was assisted by a lawyer. The author repeated the statements he had made to officers of the gendarmerie on 25 February 1998, to the effect that the reason for his non-payment of maintenance was a lack of sufficient funds.

2.17 In a judgement dated 2 December 1998, the criminal court found the author guilty as charged and gave him a six-month suspended prison sentence with probation, as well as ordering him to pay the complainant 2,000 francs in damages.

2.18 On 2 December 1998, the author appealed against the judgement. The Public Prosecution Service filed a cross-appeal on the same date.

2.19 On 31 January 2000, the author was served with a summons to appear at a hearing in the Montpellier appeal court on 4 April 2000.

2.20 By letter of 1 March 2000, the author applied for an adjournment to give him time to prepare his defence, arguing that he had dismissed the lawyer assigned to him under the legal aid scheme. The author did not attend the public hearing on 4 April 2000.

2.21 In a decision dated 9 May 2000, the Montpellier appeal court upheld the conviction and sentenced the author to six months' imprisonment, four of which were suspended, and a probationary period of two years, and ordered him to prove that he was contributing to family expenses or regularly paying the maintenance for which he was liable. The court also confirmed the civil arrangements contained in the judgement. It found the author's application for adjournment groundless, since the author had been given sufficient notice to allow him to take all necessary steps to prepare his defence, he had dismissed the lawyer assigned to him under the legal aid scheme and, as the complaint concerned non-payment of maintenance, he could have attended the hearing himself to produce any evidence he intended to use.

2.22 On 24 May 2000, the author appealed to the Court of Cassation through an advocate in council.

2.23 On 14 February 2001, the Court of Cassation dismissed the appeal.

Second set of proceedings for wilful desertion (file No. 00/01265)

2.24 On 29 December 1999, Ms. F. Zink lodged a complaint against the author for non-payment of maintenance.

2.25 At a public hearing before the Carcassonne criminal court on 5 May 2000, the author repeated the statements he had made to officers of the gendarmerie on 18 January 2000, to the effect that the reason for his non-payment of maintenance was a shortage of funds.

2.26 After hearing the parties, each of whom was assisted by a lawyer, the Carcassonne criminal court, in an adversary judgement on 5 May 2000, found the author guilty as charged and gave him a four-month suspended prison sentence with a probationary period of 18 months, and ordered him to pay his ex-wife maintenance and 2,000 francs in damages.

2.27 The author lodged an appeal on 15 May 2000. The Public Prosecution Service filed a cross-appeal.

2.28 The author was served with a summons to attend a public hearing in the Montpellier appeal court on 13 February 2001. In a letter dated 12 February 2001, the author asked the court to appoint a lawyer to defend him and said that he would be unable to attend the hearing on 13 February 2001. In an interlocutory decision dated 13 March 2001, the appeal court ordered that the trial hearing should be resumed on 18 September 2001, after the accused and the claimant for criminal indemnification had been summoned again and a lawyer had been assigned to the applicant by the President of the Bar. A lawyer was assigned to him on 10 July 2001.

2.29 The author did not attend the hearing in the Montpellier appeal court on 18 September 2001, but his lawyer addressed the court.

2.30 In a decision of 16 October 2001, the Montpellier appeal court upheld the judgement of 5 May 2000. The court stressed in particular the author's acknowledgement of the facts and his deliberate non-payment of maintenance, his only argument being that he had been unable to pay because his living costs, but not his income, had risen; yet he failed to indicate that he had applied to the family court for a reduction in maintenance.

2.31 The author has said he intends to appeal to the Court of Cassation.[1]

The complaint

3.1 The author claims that the State party has violated his rights under articles 14, 15, 16, 17 and 26, inter alia, of the International Covenant on Civil and Political Rights.

3.2 The author complains about the proceedings before the family court judge, claiming that the judge did not give him a fair hearing and failed to observe the rule that both parties should be heard, for example at a hearing on 6 July 2000 in the course of which the author says he was presented with arguments in chambers (file No. 2000/904).

3.3 The author criticizes the Montpellier appeal court for sentencing him to a prison term and increasing the sentence handed down by the criminal court when he had applied for an adjournment of the hearing to allow him to prepare his defence and when he had no assistance from a lawyer (file No. 99/00046).

3.4 The author also criticizes the French authorities for convicting him when it was simply impossible for him to pay. He claims to be the victim of an omission that does not constitute a criminal offence.

3.5 The author also considers that his legal status was not recognized and that the judgements against him constitute an attack on his reputation and honour.

3.6 The author claims to have exhausted domestic remedies. He adds that on 16 March 1995 he submitted a complaint to the European Commission of Human Rights, which declared it inadmissible on 28 February 1996.[2] The author states that the Commission did not deal with the question of maintenance.

The State party's observations on admissibility

4.1 In its observations on admissibility dated 15 May 2002, the State party begins by pointing out that the complaint taken by the author to the European Commission of Human Rights was found to be inadmissible.

4.2 Moreover, the State party finds the author's communication vague in respect of the alleged violations of the Covenant. The State party points out that, while the author cites articles "14, 15, 16, 17 and 26 (the list is non-exhaustive)" as articles that were violated, he does not specify precisely what his complaints are against the French authorities. Nevertheless, the State party believes that, on the basis of the facts submitted by the author, the complaints of violations of article 14, paragraphs 1 and 3 (d), and of article 15 of the Covenant can be considered.

4.3 The State party emphasizes that, firstly, the complaint based on article 15 of the Covenant is incompatible *ratione materiae* with the provisions of this article.

4.4 The State party explains that article 227 (3) of the French Penal Code stipulates that:

> "Failure by a person to comply with a judicial decision or a court-ratified agreement that requires that person to pay, for the benefit of a minor, legitimate, natural or adopted child, a descendant, an ascendant or a spouse, a pension, contribution, grant or any other form of payment due in accordance with one of the family obligations stipulated in titles V, VI, VII and VIII of Book One of the Civil Code, by allowing two months to pass without fully discharging this obligation, is punishable by two years' imprisonment and a fine of 100,000 francs."

4.5 Thus, a parent who fails to pay maintenance for which he or she is liable following a divorce faces criminal prosecution for the offence of wilful desertion. This offence is in the Penal Code and is perfectly applicable to the author's situation. According to the State party, the author has indeed been sentenced by the criminal courts for acts - failure to pay maintenance - that constitute criminal offences within the meaning of article 15 of the Covenant.

4.6 Secondly, the State party maintains that the claims made by the author are inadmissible because domestic remedies have not been exhausted.

4.7 With regard to the claim that the proceedings in the family court were unfair, the State party points out that the author is complaining that his evidence was not taken into account in this court, his children were not given a hearing and he was ordered to pay maintenance even though he has no income.

4.8 As far as the divorce proceedings are concerned, the author did not appeal to the Court of Cassation against the Montpellier appeal court's decision of 30 October 1997.

4.9 Likewise, as far as the post-divorce proceedings are concerned, the author did not appeal against the orders of the family court judge. Under the terms of article 187 of the new Code of Civil Procedure, an appeal against the decisions of a family court judge must be lodged within 15 days of notification of a decision.

4.10 The author did not appeal against the order of 2 November 1998 whereby the family court judge dismissed his application to have the residence of his two minor children changed (file No. 98/00312).

4.11 Nor did the author appeal against the order of 15 September 2000 whereby the family court judge dismissed his application to have the maintenance order against him rescinded or modified (file No. 2000/00904).

4.12 Lastly, the author did not lodge an appeal against the order of 18 September 2001 whereby the family court judge modified the author's visiting rights, ordered a social inquiry report and dismissed the author's application to have the maintenance order rescinded (file No. 2001/00925).

4.13 The State party adds that, in an order dated 29 March 2002, the judge in matrimonial causes withdrew the author's right to visit his children or have them stay with him. The author did not appeal against this order either.

4.14 The State party therefore believes that the author has not given the judicial authorities the opportunity to provide a remedy for the complaints he has now brought before the Committee. According to the State party, the author could, in fact, have challenged not only the decisions of the family court judge, for example those concerning the amount of maintenance, but also the procedure followed by the judge, including the procedure for exchanging documents and hearing the children.

4.15 With regard to the complaint about the unfairness of the criminal proceedings for wilful desertion (file No. 99/00046), the State party believes it should be pointed out that it was the author himself who dismissed the lawyer assigned to him under the legal aid scheme to assist him in the appeal process. Nevertheless, the author lodged an appeal to the Court of Cassation against the appeal court's decision and he was represented by an advocate in council assigned to him under the legal aid scheme.

4.16 However, the author invoked only one ground for his appeal, namely the insufficient reasons given for the sentence handed down by the appeal court. The State party points out that at no time did the author raise before the Court of Cassation the subject of any violation of the rights to a defence referred to in the complaint before the Committee, either in respect of domestic law or article 14, paragraph 3, of the Covenant.

4.17 The State party draws attention to the Committee's jurisprudence, wherein it is stated that "while complainants are not required to invoke specifically the provisions of the Covenant which they believe have been violated, they must set out in substance before the national courts the claim which they later bring before the Committee" (communication No. 661/1995, *Triboulet v. France*). It also points out that the Committee had considered a communication inadmissible on the grounds that "before the Court of Cassation … the author did not … invoke the essence of the right protected by article 15 of the Covenant; accordingly, the highest domestic tribunal never was confronted with the author's argument …" (communication No. 584/1994, *Valentijn v. France*).

4.18 The State party believes that, mutatis mutandis, the same principle should apply to the case in point. By not giving the Court of Cassation a chance to remedy the alleged violation, the author has not fulfilled his obligation to exhaust domestic remedies; hence the complaint is inadmissible.

4.19 Thirdly, the State party emphasizes that the author's other allegations are too vague to allow it to determine which complaints could be considered in relation to the provisions of the Covenant. The State party therefore requests the Committee to apply its jurisprudence and declare the communication inadmissible in accordance with article 2 of the Optional Protocol, insofar as the author has not substantiated his allegations for the purposes of admissibility.

Author's comments on the State party's submissions on admissibility

5.1 In a letter dated 8 August 2002, the author claims to be the victim of a plot and oppression by lawyers and by the entire French judicial system. He says that the French courts have sided with his wife and tried to ruin him by insisting that he should pay maintenance to her. The author says that he has systematically exhausted all domestic remedies. However, he produces no documents to support his claims and adds nothing new to his original complaint. On the contrary, he even states that he did not appeal to the Court of Cassation against the Montpellier appeal court's ruling of 30 October 1997. Moreover, he says that he does not wish to comment on the State party's observations with regard to the inadmissibility of either the claim of unfairness in the criminal proceedings for wilful desertion (file No. 99/00046), on the grounds of non-exhaustion of domestic remedies, or the claims of violations of articles 16, 17 and 26 of the Covenant.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the alleged violations of articles 15, 16, 17 and 26 of the Covenant, the Committee considers that the author has not substantiated his allegations for the purposes of admissibility under article 2 of the Optional Protocol.

6.3 With regard to the alleged violations of article 14 of the Covenant, the Committee notes that the author has not exhausted domestic remedies in relation to the proceedings before the family court judge (divorce proceedings in connection with the order of 30 October 1997 and post-divorce proceedings in files Nos. 98/00312, 2000/00904 and 2001/00925), against which no appeal has been lodged, or in relation to the criminal proceedings for wilful desertion, either in the case of file No. 99/00046, in respect of which no violation of the rights protected by article 14 of the Covenant was raised in the appeal to the Court of Cassation, or in the case of file No. 00/01265, in respect of which the appeal to the Court of Cassation was submitted after the statutory deadline.

The Committee therefore declares these complaints inadmissible in the light of article 5, paragraph 2 (b), of the Optional Protocol.

7.1 The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in French, English and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] According to the State party's observations dated 15 May 2002, the author lodged an appeal with the Court of Cassation on 16 November 2001. The appeal was found inadmissible by the Criminal Division of the Court of Cassation on 12 March 2002. Moreover, it appears from a letter sent by the author's lawyer and attached to the file that the deadline for lodging an appeal with the Court of Cassation had expired.

[2] The Commission found that: (1) the author's claims with regard to (a) the failure to respect family life by granting custody of the children to the mother (Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8), (b) inhuman treatment of the author (art. 3) and (c) the unfairness of the proceedings in the children's court (art. 6, para. 1) were ill-founded; (2) his claims with regard to the unlawfulness of the criminal charges brought against him for failure to hand over the children to the person with custody of them were groundless (art. 7); and (3) not all domestic remedies had been exhausted with regard to the complaint of a violation of the above-cited article 8.

Z. Communication No. 1082/2002, *De Clippele v. Belgium** (Decision adopted on 28 March 2003, seventy-seventh session)

Submitted by:	Mr. Olivier de Clippele (represented by counsel Mr. Arnaud Jansen)
Alleged victim:	The author
State party:	Belgium
Date of communication:	8 March 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication is Olivier de Clippele, a Belgian citizen residing in Brussels, Belgium. He claims to be a victim of violations by Belgium of article 25 (b) of the International Covenant on Civil and Political Rights. The author is represented by counsel. (The Covenant and its Optional Protocol entered into force for Belgium on 17 August 1984.)

The facts as submitted by the author

2.1 The Belgian Act of 11 April 1994 (as amended by the Act of 18 December 1998 and the Act of 12 August 2000) instituted an automated voting system in certain electoral districts, cantons and communes.

2.2 The author, as a voter and candidate in the communal elections in the commune of Ixelles, brought suit before the competent Belgian courts with a claim that the Act on automated voting did not respect the rights set out in article 25 (b) of the International Covenant on Civil and Political Rights.

2.3 On 17 November 2000, under the Belgian communal elections law, the author brought an action challenging the procedure for the preparation, holding and counting of automated votes in the communal election of 8 October 2000 in Ixelles, with a view to having the election cancelled by the Judicial Council of the Brussels-capital region.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.4 On 14 December 2000 the Judicial Council rejected the author's complaint.

2.5 On 26 December 2000 the author lodged an appeal with the Council of State.

2.6 On 4 April 2001 the Council of State rejected the author's appeal.

The complaint

3.1 The author is challenging the Act on automated voting on the following grounds:

Lack of independent monitoring of electoral procedures such that the distribution of seats between the lists might be influenced; there are four elements to this:

The system lacks transparency. The software for recording and counting votes has not been made public, so neither the main bureau nor the polling stations can effectively monitor voting procedures;

Voters have no certainty that their vote and the electronic record of their vote on the magnetic card correspond, as the software constitutes an intermediary which they cannot monitor in any way;

The counting of votes is organized and overseen by the Ministry of the Interior.

The monitoring performed by a College of Experts does not compensate for this lack of independence of the body counting the votes, as the functioning, authority and organization of the College are deficient in numerous ways (the College is unable to monitor each polling station effectively, and is powerless against fraud);

Candidates and witnesses are unable to verify the counting of votes or the results as they have no access to the software and therefore can only watch as a printer produces the results of hidden electronic processing;

Restriction of the right to vote, as the voter must select a list without being able to view all the candidates on each list at the same time;

Unreliability and errors relating to the automated vote that came to light in the elections of 8 October 2000, when there were discrepancies at several polling Stations between the number of cards recorded in the ballot boxes and the number of voters who actually voted, and between the number of magnetic cards recorded and the number cancelled.

3.2 The author claims that the Act on automated voting that was applied in the communal elections of 8 October 2000 contravenes article 25 (b) of the Covenant.

3.3 The author states that all domestic remedies have been exhausted, and indicates that the matter has not been submitted under any other procedure of international investigation or settlement.

State party's observations on admissibility

4.1 In its observations of 29 July 2002, the State party challenges the admissibility of the communication.

4.2 Firstly, referring to the Committee's jurisprudence,[1] the State party asserts that the author has not demonstrated that he is a victim. The author voices general and abstract criticism of the automated voting system without specifically demonstrating that such a system could have affected him directly or caused him personal harm, either as a candidate for the communal elections in Ixelles or as a voter in the same commune. The State party affirms that as a candidate the author suffered no harm, since he was elected. Furthermore, according to the State party, the author makes no specific allegation that the supposed irregularities that he has complained of falsified the results of the Ixelles communal elections to either his detriment or that of the candidate for whom he voted.

4.3 Secondly, the State party maintains that the author has not exhausted domestic remedies in respect of his complaint alleging discrepancies at several polling stations between the number of cards recorded in the ballot boxes and the number of voters who actually voted, and between the number of magnetic cards recorded and the number cancelled. According to the State party, the Judicial Council of the Brussels-capital region, as the administrative court of first instance with competence for communal election disputes, decided in a judgement of 14 December 2000 that these allegations constituted new pleas, submitted after the expiration of the 40-day time limit for the filing of complaints with the Council (Act on communal elections, art. 74 (1)). In fact these pleas did not appear at all in the original complaint and were advanced only later, in the submissions filed on 8 and 11 December 2000. The Council, considering that these were new pleas and that they could not be considered merely as developments of the pleas in the initial complaint, found them inadmissible. Furthermore, according to the State party, the Council of State, acting as an appellate body, at the conclusion of a detailed statement of reasons in a judgement dated 4 April 2001, fully concurred in that view and concluded that "the plea submitted out of time to the Judicial Council was inadmissible and remains so on appeal before the Council of State".

4.4 Basing itself on the Committee's jurisprudence,[2] the State party considers that the author has not exhausted domestic remedies inasmuch as he failed to exhaust such remedies owing to his own negligence, by failing to comply with the time limit for the filing of appeals stipulated by domestic law.

4.5 Thirdly, the State party maintains that the author has not sufficiently substantiated his allegations. Referring to the Committee's jurisprudence,[3] the State party considers that the author merely makes assertions without producing concrete evidence justifying admissibility.

4.6 Lastly, the State party points out that the author's complaints have been carefully considered by the national courts, and that in accordance with the Committee's jurisprudence[4] it is for the appeal courts in States parties, not the Committee, to review the findings of facts in a given case unless it can be proved that the courts' decisions were clearly arbitrary.

4.7 The State party points out that the Council of State observes first of all that article 25 (b) of the Covenant neither prescribes nor prohibits any specific voting system.

4.8 The Council of State refutes the complaints of a lack of transparency in the automated voting system, in particular as the "source code" was divulged, albeit without the security algorithms. There is no indication that the transparency provided by divulging the "source code" was insufficient.

4.9 Concerning the ability of voters to verify their votes, the Council of State notes, and the author acknowledges, that voters are able to verify their votes after having expressed their choice, and that the monitoring performed by the College of Experts has shown that there was no discrepancy between the votes as displayed and the information recorded on the magnetic card.

4.10 As for the independence of the College of Experts, the Council of State notes that the author criticizes the College for being elected by legislative assemblies. The Council of State observes firstly that such reasoning, if followed, would necessarily cast doubt on the independence and impartiality of all judges in Belgium, who are appointed by the King on the nomination of the competent minister, and thus on the country's established authorities. The Council of State then notes that no specific evidence demonstrating the lack of independence of the College has been put forward. In fact, the Council of State notes that criticism by the College, in its report on the elections of 13 June 1999, led to amendment of the Act of 11 April 1994. In its report on the elections of 8 October 2000 the College lists the various improvements made to the automated voting system, both in respect of procedures and equipment. Among these improvements was the possibility for voters themselves to verify their votes.

4.11 The Council of State then draws attention to the fact that prior to the elections of 8 October 2000 the College of Experts carried out tests involving casting votes, viewing them and comparing the results with the votes cast, and that it noted that the voting machines accurately recorded the votes in the computer's memory. The Council of State also points out that verification exercises were conducted both on election day and afterwards, during which it was confirmed that: (1) the software commands were identical to those created during the benchmark compilation; (2) the magnetic card readers did not alter the content of the cards in the ballot box; and (3) it is possible to carry out an independent recount by viewing all the cards in a commune's ballot box one by one, and counting the votes manually. The Council of State also emphasizes that a double appeal can be lodged, with the Provincial Executive Council or the Judicial Council in first instance, and subsequently with the Council of State on appeal, and that these bodies can order investigations. These bodies have full competence, and their intervention thus provides an additional guarantee.

4.12 With regard to the complaint of restriction of the right to vote, the Council of State notes, on the one hand, that article 15 of the Act of 11 April 1994 provides that all lists of candidates must be posted at each polling station and in each voting booth, and, on the other hand, that article 7 stipulates that the number and party affiliation of all candidate lists must be displayed on the screen, with an invitation to confirm the vote cast and the option, as long as the vote has not been confirmed, of starting over. The right to vote is thus not hindered in any way by the automated voting system.

4.13 In respect of the complaint concerning unreliability and errors associated with automated voting, the Council of State rejects that plea as the case has not been properly brought before a court of first instance.

Author's comments on the State party's observations concerning admissibility

5.1 In his letter of 26 September 2002, the author contests the State party's arguments.

5.2 Firstly, he maintains that he was personally and directly a victim of the failure to respect article 25 (d) of the Covenant, which confers upon him individual political rights, and requests the Committee to examine the violation of his rights stemming from the application of the Act of 11 April 1994 on automated voting in the communal elections of 8 October 2000. In the author's opinion, the guarantees of substance and form corresponding to the electoral rights citizens are ensured under the Covenant are not fulfilled by the automated voting system, and it would thus be unreasonable to demand concrete evidence of irregularities.

5.3 Secondly, in respect of the exhaustion of domestic remedies, the author acknowledges that the complaints of discrepancies at certain polling stations between the number of cards recorded in the ballot boxes and the number of voters who actually voted, and between the number of magnetic cards recorded and the number cancelled, were found inadmissible on procedural grounds, as they were out of time. However, according to the author, this has no bearing on the admissibility of his communication concerning the violation of article 25 (b) of the Covenant by the Act on automated voting applied in the communal elections of 8 October 2000.

5.4 Thirdly, the author contends that his allegations are duly substantiated by rigorous, serious and detailed analysis. The author maintains that his communication does not relate to actual facts or evidence, namely the holding of the elections, the existence of the Act of 11 April 1994 on automated voting and the way in which it was applied, but, rather, to the compatibility with article 25 (b) of the Covenant of the Act in its present form and as it has been applied. The author states that he is not convinced by the judgement issued by the Council of State on 4 April 2001, in particular for the following reasons: (1) the Council of State did not respond to the criticism that it was materially impossible for the College of Experts to monitor all the polling stations; (2) the Council of State referred to the findings of the College of Experts in respect of the problem of verification by voters of the accuracy of their votes, but failed to respond to the above criticism; (3) the author maintains the complaint concerning the lack of guarantees of independence of the College of Experts; and (4) the Council of State did not address the question of the monitoring of the vote count by candidates and their witnesses.

Issues and proceedings before the Committee concerning admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 In respect of the exhaustion of domestic remedies, the Committee notes the arguments of the State party to the effect that the allegations of discrepancies at several polling stations between the number of cards recorded in the ballot boxes and the number of voters who actually voted, and between the number of magnetic cards recorded and the number cancelled, are inadmissible, as these complaints were not raised with the competent national courts in the period set by law. The Committee also notes that the author acknowledges these reasons for inadmissibility. The Committee therefore considers that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 In respect of the complaints concerning the absence of independent monitoring of electoral procedures and restriction of the right to vote resulting from the Act on automated voting, the Committee considers that even assuming that the author could claim the status of a victim of an alleged violation of the Covenant, he has not provided any evidence to substantiate his complaint.

The Committee therefore considers that this part of the complaint is inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), and article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Communications Nos. 35/1978 (*Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*); and 831/1998 (*Michael Meiers v. France*).

[2] Communications Nos. 925/2000 (*Wan Kuok Koi v. Portugal*); 26/1978 (*N.S. v. Canada*).

[3] Communication No. 779/1997 (*Äärelä, Anni and Näkkäläjärvi, Jouni v. Finland*).

[4] Communications Nos. 866/1999 (*Marina and Al Torregrosa Lafuente v. Spain*) and 947/2000 (*Barry Hart v. Australia*).

AA. Communication No. 1088/2002, *Veriter v. France** (Decision adopted on 6 August 2003, seventy-eighth session)

Submitted by: Bernard Veriter

Alleged victim: The author

State party: France

Date of communication: 16 August 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 6 August 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Bernard Veriter, a French citizen born in Belgium on 11 July 1946, residing at Moulins les Metz, France. He claims to be a victim of violations by France of articles 2 and 14 of the International Covenant on Civil and Political Rights. The author is not represented by counsel.

The facts as submitted by the author

2.1 After completing his military service in the Belgian army, the author acquired French nationality by marriage. He was taken on by the French administration on 1 January 1978 as a prefectoral officer. He then applied for his period of military service to be taken into account when his entitlement to promotion on grounds of seniority and his pension rights were determined (on 24 November 1982 he requested a ruling from the Ministry of the Public Service; on 11 July 1988 he lodged a request with the Ministry of the Interior).

2.2 On 18 November 1988 and 20 July 1989, the author applied to the Strasbourg administrative court for the annulment of the decision by which the Minister of the Interior had implicitly rejected his request by failing to reply to his letter of 11 July 1988. In a ruling dated 5 September 1991, the court rejected these requests, noting inter alia that the Community regulations[1] invoked by the author related only to nationals of one State who were working in another, and that this did not apply to Mr. B. Veriter, a French citizen working in France. The author appealed against this ruling. By decision of 15 June 1994, the Council of State declared the appeal inadmissible.[2]

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* The following members of the Committee participated in the examination of the present communication: Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.3 Following this ruling, the author lodged a complaint with the Commission of the European Communities. The Commission pointed out to the French Government that its refusal to validate past service was contrary to article 48, paragraph 4, of the EEC treaty relating to equal treatment between workers in different member States, as interpreted by the Court of Justice of the European Communities (case 15/69 UGLIOLA). The French Government then conceded that the rules in force, and specifically article L.63 of the National Service Code, needed to be amended.

2.4 This amendment stemmed from Act No. 96-1043 of 16 December 1996, on employment in the public service and various organizational measures. The new article 5 ter of Act No. 83-634 of 13 July 1983, on the rights and obligations of public officials, now provides, in relation to periods of military service performed in another member State, that "such time shall be taken into account in calculating the seniority required for promotion in the public service for the State, local government and the hospital service".

2.5 On 15 January 1997, the author lodged a new request for the period of his national service to be taken into account. Yet on 29 May 1997 the prefect of Moselle department conveyed to him the negative decision taken by the Minister of the Interior on 20 May 1997, on the grounds that the new legislation had not been in force at the time of his recruitment.

2.6 On 11 July 1997, the author once again applied to the Strasbourg administrative court for the annulment of this decision.

2.7 During the course of the proceedings, the Minister of the Interior reversed his decision and agreed to take the author's military service into account in considering his promotion. By ministerial order of 16 March 2001, the author's 13 months of military service were recognized for purposes of seniority when he was promoted to the sixth grade of principal prefectoral officers.

2.8 On 6 July 2001, the Strasbourg administrative court ruled that the failure to take the author's national service into account on the sole grounds that it had been performed in Belgium constituted discrimination in breach of article 48 of the Treaty establishing the European Community and (EEC) regulation No. 1612/68 of 15 October 1968, which were both already in force when the complainant entered the French public service and were directly applicable by France. The court annulled the contested decision of 20 May 1997 as well as the order of 16 March 2001 insofar as it took into account the period of national service performed by the author only for the purposes of the next promotion exercise and not from the beginning of his career as a public official. The court called on the Minister of the Interior to upgrade the author's career file in accordance with the conditions thus defined.

The complaint

3.1 The author claims to have been the victim of discrimination based on nationality, covered by article 2 of the Covenant.

3.2 The author also complains of improper administration of justice in the present case, insofar as the Strasbourg administrative court reversed its ruling of 5 September 1991 in its order of 6 July 2001. The author calls for the enforcement of this order, though he does not consider the order to constitute redress for the discrimination he suffered over a period of 22 years.

3.3 The author states that he has exhausted domestic remedies, and that the matter has not been submitted under any other procedure of international investigation or settlement.

State party's observations on admissibility

4.1 In its observations submitted on 13 November 2002, the State party challenges the admissibility of the communication.

4.2 Firstly, it holds that the author can no longer claim to be a victim of a violation of article 2 of the Covenant.

4.3 The State party points out that the Committee, like the European Court of Human Rights, requires that the complainant must make a personal and effective claim to be the victim of a violation of one of the rights set out in the Covenant, and must have a personal interest in making such a claim. Invoking the case law of the European Court, the State party contends that the status of victim must be reviewed at all stages of the proceedings. Hence the complainant may lose this status during the proceedings, for example following adequate domestic redress of the consequences of the alleged violation. The Court considered that "a measure by a public authority … deprives such a person of his status as a victim only when the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, such breach (CEDH, Nsona judgement, 28 November 1996). In this way, the quashing by a domestic court of a disciplinary measure against a teacher removes the status of victim from the teacher once the sanction is considered never to have existed, and once it retrospectively ceases to have any effect (CEDH, *Akkoc v. Turkey* judgement, 10 October 2000).

4.4 In the present case, in the view of the State party, it must be acknowledged that the author brought his case to the Committee a few days after being notified of the ruling of 6 July 2001, without giving the appropriate departments in the Ministry of the Interior an effective opportunity to take the enforcement measures called for in the ruling. The State party explains that, by order of the Minister of the Interior dated 19 October 2001 - only two months after the ruling had been communicated - the author's file had been upgraded as instructed by the court. In addition, the sum which the State had been ordered to pay in respect of procedural costs had been paid. The State party therefore considers that the author is no longer a victim of a violation of article 2 of the Covenant, and that the communication is therefore inadmissible under article 2 of the Protocol.

4.5 Secondly, in the view of the State party, the author is endeavouring to establish that the above admissibility criterion has been met by maintaining that, notwithstanding the court ruling of 6 July 2001, no redress had been made for the discrimination suffered for 22 years. In the view of the State party, if it were to be assumed that, despite the decision to upgrade the author's file, the author had not obtained redress for the entirety of the injury suffered, then it would have to be concluded that the communication did not satisfy the requirement that all domestic remedies must have been exhausted. This is a classic condition of admissibility[3] which "refers in the first place to judicial remedies",[4] in other words, remedies which are available, are capable of providing relief in respect of the complainant's claims,[5] and "must offer a reasonable prospect of success".[6]

4.6 The State party contends that, in the present case, it is all the more obvious that domestic remedies have not been exhausted as the author has recently applied once again to the Strasbourg administrative court for compensation for the injury suffered. On the very day when the author lodged his complaint with the Committee - 16 August 2001 - he submitted to the Minister of the Interior a demand for the payment of 2,500 French francs, apparently as compensation for the suffering caused by the illegal refusals of his requests. As no express reply had been given to this request, as early as 27 November 2001 the author lodged a further application with the Strasbourg administrative court requesting it to order the French authorities to pay him the above-mentioned sum, plus 400 French francs as costs. The court is not yet ready to rule on this application, but according to the State party it has reasonable prospects of success, since in domestic law, fault always attaches to an unlawful administrative decision, for which the administration may therefore incur liability (Council of State, 26 January 1973, Driancourt Rec., p. 77). Yet since the domestic courts have not yet been able to rule on this application, it is clear that domestic remedies have not been exhausted. In any event, in the opinion of the State party, if the author persists in his view that the administration has not fully taken on board the 6 July 2001 ruling and has not correctly upgraded his file, it is for him to apply once again to the Strasbourg administrative court for annulment of the above-mentioned order of 19 October 2001. Yet, as far as the State party is aware, the author has not done so. Hence the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Protocol.

4.7 Thirdly, in the view of the State party, the allegation of improper administration of justice - on the grounds that, on the same matter, the Strasbourg administrative court rejected the author's application, but ruled in his favour 10 years later on the basis of the same European Community instruments - is incompatible with article 14 of the Covenant. This article establishes no right to an absence of errors of law on the part of a judge.

Author's comments on the State party's observations concerning admissibility

5.1 In his comments made on 10 December 2002, the author states that he retains the status of a victim insofar as the upgrading of his file takes no account of compensation for the cumulative falling behind over a period of 20 years, and does not redress the injury resulting from such lengthy discrimination. He also states that a reasonable period of time would already appear to have been exceeded since his first appeal against discrimination, and that he should not be required to wait further.

5.2 In relation to the allegation of a violation of article 14 of the Covenant, the author challenges the impartiality of the Council of State in declaring his application inadmissible, in view of the fact that neither of the parties had raised that issue, and that the application had twice been declared admissible by the administrative court. Lastly, in the view of the author, it is very difficult to challenge an administrative court or the Council of State in the absence of gross negligence.

Issues and proceedings before the Committee concerning admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 In relation to the allegation of a violation of article 2 of the Covenant, the Committee takes note of the arguments invoked by the State party to the effect that the author has lost his status as a victim insofar as the Strasbourg administrative court's ruling of 6 July 2001 was enforced by the Minister of the Interior's order dated 19 October 2001, which both upgraded the author's file by validating his national service and paid his procedural costs. The Committee has also noted the author's argument challenging the State party's conclusion on the grounds that the discrimination had not been redressed. The Committee considers that the allegation of discrimination and the issue of redress constitute two distinct elements of the complaint. The Committee notes, first, that the complaint of discrimination was resolved by the ruling of 6 July 2001, whose enforcement was sought by the author, and that the State embarked thereon by means of the order of 19 October 2001. Moreover, any challenge to this order on the part of the author would involve an appeal to the Strasbourg administrative court. Secondly, the Committee notes that compensation for the discrimination is the subject of an appeal lodged in the Strasbourg administrative court by the author on 27 November 2001, in respect of which proceedings are continuing. Lastly, the Committee considers that the author has not exhausted domestic remedies for the purpose of establishing the admissibility of the allegation of a violation of article 2 of the Covenant. This is without prejudice to the question whether article 2 is capable on its own of being violated independently of another provision of the Covenant or whether the complaint should have been made under article 26 rather than article 2.

6.4 Concerning the alleged violation of article 14 of the Covenant, the Committee has taken note of the arguments of the State party asserting that the elements of the complaint are incompatible *ratione materiae* with the provisions of the Covenant. The Committee has also noted the author's argument relating to improper administration of justice on the part of the administrative court and the Council of State, as well as the difficulty of appealing against their decisions. The Committee refers to its case law, under which it is generally a matter for domestic courts to examine the events and the evidence in a particular case, unless it is clear that their assessment was arbitrary or that it amounts to a denial of justice. The Committee considers that the author has not provided sufficient substantiation for his complaint of improper administration of justice. The Committee also considers that, notwithstanding any doubts the author may have had as to the effectiveness of the remedies, it was incumbent on him to seek all available remedies. Lastly, this part of the communication is inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently translated into Arabic, Chinese and Russian for this report.]

Notes

[1] European Union rules.

[2] Considering that in his request to the Minister of the Interior, the author had confined himself to asking for his military service in the Belgian army in Germany to be taken into account in determining his seniority and pension rights, without indicating which specific decision he was challenging or requesting; that consequently the Minister's silence could not have given rise to an adverse decision against which an ultra vires action could be brought; that as a result Mr. Veriter had no grounds for his complaint that the Strasbourg administrative court, by adopting the contested ruling, had rejected his request.

[3] Communication No. 130/1982 (*J.S. v. Canada*), decision of 6 April 1983.

[4] Communication No. 262/1987 (*R.T. v. France*), decision of 3 April 1989.

[5] Communications Nos. 146 and 148-154/1983 (*Baboeram v. Suriname*), Views dated 4 April 1985.

[6] Communication No. 550/1993 (*Faurisson v. France*), Views dated 16 December 1996.

BB. Communication No. 1091/2002, *Perera v. Sri Lanka** (Decision adopted on 7 August 2003, seventy-eighth session)

Submitted by:	Wannakuwatte Perera
Alleged victim:	The author
State party:	Sri Lanka
Date of communication:	18 April 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 August 2003,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 18 April 2001, is Wannakuwatte Perera, a Sri Lankan national who was born 30 October 1938. He claims to be a victim of violations by the Democratic Socialist Republic of Sri Lanka of article 14, paragraph 1, of the Covenant. He is not represented by counsel. The Optional Protocol entered into force for Sri Lanka on 3 October 1997.

1.2 On 17 October 2002, the Committee's Special Rapporteur on new communications decided to separate the consideration of the admissibility and merits of the communication.

The facts as presented

2.1 While acting as a Deputy Chief Manager of the People's Bank (a State bank of Sri Lanka), the author was "interdicted" by the bank alleging that he had misled the Regional Office of the Bank in approving the provision of facilities to a customer. According to the author, the bank itself did not incur any loss in this transaction, and the allegations were based on conjecture and bias, in order to cover up certain malpractices of two superior officers who were directly involved in providing facilities to the customer.

2.2 After an internal inquiry, the author was dismissed from service on 2 March 1987, without any opportunity to call witnesses in his favour. In 1988, the author failed to obtain relief from the Labour Tribunal and therefore appealed to the High Court.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

2.3 On 13 February 1998, the High Court held that the author had been improperly dismissed, and ordered Rs. 474,941.60[1] compensation and costs, in lieu of re-instatement, as at that point the author had passed the 55-year retirement age. The author appealed to the Supreme Court, on the basis that the relief granted in the High Court was inadequate, in particular as it did not take into account salary increases that he would have received had he not been dismissed. The author's employer cross-appealed to the same Court against the High Court's finding of improper dismissal.

2.4 On 22 March 2000, the Chief Justice of the Supreme Court, sitting with two other justices of the court, examined the various briefs and allegedly commented that it was not worth reading such a heavy brief on a matter that was "a minor one". The Chief Justice allegedly went on to state that some injustice had been done to the author and suggested "some compensation". The author's counsel objected and argued that the quantum of damages fixed in the judgement of the High Court was inadequate, and pleaded that the case be argued and heard. That notwithstanding, the Chief Justice advised the counsel for the parties to reach an agreed settlement and postponed consideration of the case.

2.5 On 9 May 2000, when the matter came up for the second time before the Supreme Court, the Chief Justice did not allow the author's counsel to argue the case although it was fixed for argument, and threatened to dismiss the case if no settlement was reached by a further date, which was fixed for 12 September 2000. He allegedly stated that the case should come only before him.

2.6 On 12 September 2000, the employer's counsel agreed to pay SL Rs 469,941.60 (about US$ 4,690) as compensation to the author. On that basis, the Supreme Court on the same day dismissed both appeals without costs, allegedly over objections from the author's counsel that the author's entitlements to pension rights should be recorded. Since that point, the author contends that his employer has allegedly improperly denied him pension entitlements.

2.7 The author has petitioned the President of Sri Lanka, but no response has been received.

The complaint

3.1 The author alleges a violation of article 14, paragraph 1, of the Covenant, in that he was denied a fair hearing by the Supreme Court and that, in dealing with his case, the Supreme Court did not act as an independent and impartial tribunal inasmuch as the author was forced to accept whatever order was directed by the Court.

3.2 The author contends that neither his counsel nor himself had any alternative but passively to accept the Supreme Court's order. He alleges that even the intervention by the author's senior counsel requesting that his entitlement to his pension rights should be recorded, "fell on deaf ears".

3.3 Furthermore, the author considers that, although his pension entitlements are unaffected by the settlement directed by the Supreme Court, his former employer has ignored the author's repeated requests to be granted such entitlements on the basis of that Court's order, as a result of the Court's failure to record his entitlements.

3.4 The author accordingly requests the Committee to declare that he has not received a fair hearing and therefore that he has been deprived of his rights to the payment of pension and other benefits by his former employer. He further requests the Committee to request payment of adequate compensation commensurate with his actual losses suffered, taking into account what his career path would have been.

The State party's submissions on the admissibility of the communication

4.1 By submission of 10 October 2002, the State party argues that the communication is inadmissible for failure to establish a prima facie violation of the author's rights under article 14, paragraph 1, of the Covenant, and inadmissible for failure to exhaust domestic remedies concerning his remaining claims.

4.2 As to the claim under article 14, paragraph 1, the State party observes that the judgement of the Supreme Court reflects an agreement reached by the parties, i.e. the author and the People's Bank. Both parties were represented by counsel who entered the settlement in court on behalf of their respective clients. In fact, the author was represented by very senior counsel in the local bar, with over 30 years of practice. The State party refers to the failure of the author to produce any material to the Committee suggesting either that his counsel did not in fact agree to the settlement, or that counsel had agreed under coercion or duress. In these circumstances, the author's contention that the consent given on his behalf for the settlement reflected in the Court order was involuntary is unsubstantiated. On the contrary, the circumstances demonstrate that the author at all times voluntary acquiesced in, and accepted, the settlement entered in Court.

4.3 The State party further observes that the sole reason advanced by the author in support of his contention that he did not get a fair hearing in the Supreme Court is the alleged conduct of the Chief Justice. However, the State party notes that the judgement reflects the collective decision of the Court and not the individual sentiments of the Chief Justice. In fact, the bench of three judges who heard the case was unanimous in its decision. The author did not complain about the conduct of the two other judges who participated in the proceedings and order reached, and those judges enjoy constitutional parity of status with the Chief Justice in the conduct of judicial proceedings. Therefore, the author's contention that he was denied a fair hearing is misconceived and without merit.

4.4 In any event, the State party observes that if the author was dissatisfied with the conduct of the Chief Justice or any judge(s), he could have lodged an objection, either orally or in writing, objecting to the participation of such judge(s) in further proceedings. In the instant case, the author did not exercise such rights, although he had every opportunity to do so, which only reinforces the contention that he acquiesced in, and accepted, the Supreme Court's decision.

4.5 As to the author's further complaints, the State party notes that they focus on the claim that the author's pension entitlements were adversely affected by the order of the Supreme Court. However, as borne out in the judgements of both the High Court and the Supreme Court, his entitlements in this respect at no time formed any part of the subject matter of the proceedings before either the Labour Tribunal or the courts. What was judicially decided was whether the termination of the author's service was justified or not. Hence, these tribunals could not have made an order on pension entitlements, and indeed the author himself acknowledges that the Supreme Court's decision did not even mention these entitlements.

4.6 The State party further observes that pension entitlements are governed by statute, and several constitutional and statutory remedies are available to enforce such rights in the event of non-compliance by the party obliged to pay them. Thus, the author could have sought prerogative relief by way of mandamus in the Court of Appeal pursuant to article 140 of the Constitution, or he could have invoked the fundamental rights jurisdiction of the Supreme Court under article 126 of the Constitution. He failed to avail himself of either such remedy, although he had every opportunity to do so. Accordingly, he has failed to exhaust all available domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol.

The author's comments on the State party's submissions

5.1 By letter of 3 December 2002, the author rejected the State party's observations, recalling that the Chief Justice had threatened to dismiss the case if no settlement was reached, and directed that it be scheduled to be heard only before him. The author argues his counsel was left with no option but to submit to the wishes of the Chief Justice, the final judicial authority in the State's legal system.

5.2 In this connection, the author states that the arbitrary and partisan handling of certain judicial matters has become the subject of investigation by various international bodies, such as the International Bar Association (IBA), which sent a mission to Sri Lanka "to identify the circumstances surrounding the calling of a referendum on the constitution, assess the constitutional position of such action and the implication for the rule of law, in the light of recent cases seeking to disbar the Chief Justice from practicing as a Lawyer (...)".[2] The author also refers to an impeachment motion against the Chief Justice submitted to the Speaker of Parliament on 6 June 2001, regarding other cases where the Chief Justice had allegedly abused his position. The author claims that it is abundantly clear that the attitude of the Chief Justice created a situation where litigants, lawyers and even judges, who all were under the authority of the Chief Justice, were compelled to acquiesce. In such a situation, he contends that he found himself helpless as a litigant and without any means of redress.

5.3 On the pension rights issue, the author refers to correspondence from his former employer, in which the latter interprets the Court's order conclusively to determine the issue of pension entitlements. In a letter of 31 March 2001, the former employer stated that it would not entertain any further communication with the author claiming "various payments including terminal benefits", as the author's claim had been settled by the Supreme Court. According to the author, this situation would not have arisen if the Chief Justice, as requested by his counsel at the hearing of his case, had recorded that the settlement, albeit imposed upon the author, would not affect his pension entitlements.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 As to the author's claim under article 14, paragraph 1, of the Covenant, the Committee notes that the Supreme Court's decision of 12 September 2000 was delivered by three justices of the Court. The allegations of improper conduct in the administration of justice in certain other cases made against the Chief Justice in the parliamentary notice of resolution do not, in the Committee's view, substantiate the author's claim that the encouragement by the Chief Justice to both parties' counsel to reach an amicable settlement on the quantum of damages exceeded the bounds of a superior court's proper management of its judicial resources in violation of article 14, paragraph 1. The Committee notes, in this context, that counsel did not explicitly contest the Court's oral framing of the disposition of the case, and that, in substance, the High Court's findings in the author's favour were almost entirely upheld at the appellate level. Accordingly, the Committee considers this claim unsubstantiated, for the purposes of admissibility, and consequently to be inadmissible under article 2 of the Optional Protocol.

6.4 As to the claim concerning the author's entitlement to his pension rights, the Committee notes that the issue of such entitlements at no time formed part of the proceedings before the domestic courts, which were concerned with the lawfulness of the author's dismissal and the quantum of the resulting damage, and in particular that this issue was not addressed in the Supreme Court's order of 12 September 2000. To the extent that the author's former employer may be denying him his lawful pension entitlements, the Committee observes that there are a variety of domestic remedies available to him against his employer, by which his rights in this regard may be vindicated. Accordingly, this claim is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust domestic remedies.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The compensation comprised SL Rs 469,941.60, being the author's last monthly salary multiplied by the months that had passed until judgement, and SL Rs 5,000 as costs.

[2] Report of The International Bar Association 2001, *Sri Lanka: Failing to protect the Rule of Law and the Independence of the Judiciary*. http://www.hg.org/cgi-bin/redir.cgi?url=http://www.ibanet.org.

CC. Communication No. 1114/2002, *Kavanagh v. Ireland*[*]
(Decision adopted on 25 October 2002, seventy-sixth session)

Submitted by:	Mr. Joseph Kavanagh (represented by Mr. Michael Farrell)
Alleged victim:	The author
State party:	Ireland
Date of communication:	8 July 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 2002,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 8 July 2002, is Joseph Kavanagh, an Irish national, born on 27 November 1957, who is currently imprisoned in Mountjoy Prison, Dublin. He claims to be a victim of violations by the Republic of Ireland of article 2, paragraphs 3 (a) and (b), and 26 of the Covenant. He is represented by counsel.

The facts as presented by the author

2.1 On 4 April 2001, the Human Rights Committee adopted its Views on Communication 819/1998, holding that the author's right to equality before the law, guaranteed in article 26 of the Covenant, had been violated, in that the Director for Public Prosecutions (DPP) had directed the author to be tried before a Special Criminal Court without providing grounds justifying the selection of that particular trial procedure in his case.[1] The Committee stated in its Views that the author was entitled to an "effective remedy".[2] The State party was "also under an obligation to ensure that similar violations do not occur in the future; it should ensure that persons are not tried before the Special Criminal Court unless reasonable and objective criteria for the decision are provided".[3]

2.2 On 28 April 2001, the day after receipt of the Committee's Views, counsel wrote to the Minister for Justice, Equality and Law Reform seeking his release, indicating that in the alternative legal action to vindicate his rights would be pursued. On 30 April 2001, the letter was formally acknowledged.[4] As under Irish practice applications challenging an individual's detention are brought as soon as possible, on 3 May 2001, the author applied *ex parte* to the High Court. The application sought his release, the quashing of his conviction, a declaration that s.47 (2) of the Offences Against the State Act 1939 was incompatible with the Covenant and repugnant to the Constitution, the author's release on bail pending the outcome of the proceedings, damages, other relief and costs. The application was grounded on the Committee's Views and a claim that the Government was obliged by the Constitution and the doctrine of legitimate expectation to act on the Committee's Views.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir. Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

2.3 On 20 and 21 June 2001, the application for leave to seek judicial review was heard in the High Court, with the State opposing the grant of leave. It was argued for the author that, even though the Covenant had not been expressly incorporated into Irish law and thus had not become directly binding at domestic level, the Covenant and/or its principles had become part of customary international law and in that manner binding. It was also argued that by ratifying the Covenant and the Optional Protocol the State party had given rise to a legitimate expectation that it would abide by and implement the Views of the Committee in cases brought before it. The State also sought costs against the author, while the author sought costs for raising (for the first time) a point of considerable public importance.

2.4 On 29 June 2001, the High Court refused leave, holding that the author had not established an arguable case. In the absence of direct incorporation of the Covenant, the Covenant could only be relevant in the domestic legal order through article 29 (3) of the Irish Constitution.[5] However, the Court considered that even accepting *arguendo* that the Covenant or its principles had become "generally recognised principles of international law" cognizable in the courts, the only rights conferred were concerning relations between States and not upon individuals such as the author. It made no order as to costs, leaving the author to bear his own costs.

2.5 Once the High Court's Order was made available, on 16 July 2001, the author appealed to the Supreme Court. The appeal was not heard until 13 December 2001 despite requests for expedition as the author was in custody. The State again opposed the author's appeal. The State also sought costs against the author, while the author again sought his costs for raising an issue of public importance. On 1 March 2002, a five-judge bench of the Supreme Court, including the Chief Justice, rejected the author's appeal against the High Court's denial of leave to appeal, holding that the author had not established an arguable case. It found that neither the Covenant nor the Committee's Views could be given domestic effect in Irish law. It stated that the Committee's Views could not prevail over the Offences Against the State Act, or over a conviction by a court established under its provisions. The Court made no order as to costs, leaving the author to bear his costs.

2.6 On 8 August 2001 (3 months and 10 days after receipt of the Committee's Views), the Minister for Justice, Equality and Law Reform offered the author £1,000 in acknowledgment of the Committee's Views, without specifying whether it was compensation, a contribution to legal costs, or for some other purpose. It did not indicate the steps being taken to avoid future violations.

2.7 Shortly thereafter, the author received from the Committee's secretariat a copy of the State party's follow-up reply to the Committee's Views in the original communication. The reply informed the Committee of the proposed payment to the author, and enclosed a partial copy of an interim report of a Committee set up separately by the Government to review the Offences Against the State Acts, 1939 to 1998.

2.8 On 22 August 2001, the author returned the cheque to the Minister as totally inadequate and not in any way constituting an effective remedy. He stated that the most appropriate remedy would have been to quash the conviction and order a retrial before the ordinary courts, but as he had already served the bulk of his sentence, he should be released. By letter of 24 August 2001, the Minister acknowledged receipt of the author's letter rejecting the proferred remedy. No further communication from the Minister has transpired. The issue of the cheque did not arise in the court proceedings.

2.9 By letter of 5 October 2001 (expanding on a letter of 22 August 2001), the author responded to the State party's follow-up reply, detailing why he regarded the proposed remedy as inadequate and ineffective. The author argued that a violation of Covenant rights should be treated analogously to violations of the fundamental rights in the Constitution. The Irish courts had in the past been vigilant to prevent breaches of these rights resulting in convictions, and have accordingly overturned convictions and ordered payment of substantial sums of compensation. The author also provided to the Committee a dissenting opinion (not provided to the Committee by the State party) by the Chair and two members of the committee established to review the relevant legislation, which had found that there was no possible amendment to the Acts which would remedy the violation of the Covenant identified by the Committee in the use of the Acts. In any case, the author states that no decision has been announced on the DPP's powers and he continues to direct trial before the Special Criminal Court without supplying grounds.

2.10 The author observes that in the course of the legal proceedings, the State made no movement towards providing him with any remedy. He states that with the Supreme Court's rejection of his appeal, all domestic remedies have been exhausted.

The complaint

3.1 The author claims a violation of article 2, paragraph 3 (a), in that the State party has not provided him with an effective remedy for the breach of article 26 already found by the Committee, the effects of which are continuing. He relies on a series of cases where the Committee found violations of article 2, paragraph 3, alongside a substantive violation of the Covenant, because the legal system concerned did not provide an effective remedy for the substantive violation.[6] He also distinguishes his case from statements by the Committee that article 2 cannot be invoked independently of a substantive violation by pointing out a substantive violation has already occurred and been found by the Committee.

3.2 The author also claims a violation of article 2, paragraph 3 (b), by not ensuring that he could have his right to a remedy determined by the competent authorities, and by not developing the possibilities of judicial remedy for cases such as his. There is no machinery in Irish law to which a person in the author's situation can turn. There was no procedure for making representations/submissions to the Minister as to what might constitute an effective remedy, or for challenging or obtaining an independent review of the Minister's decision. The proposed remedy of £1,000 falls far short of even paying the author's costs in connection with his communication and the subsequent judicial review proceedings. The author submits that the possibility to apply to the Minister for a discretionary ex gratia remedy does not satisfy the requirements of article 2, paragraph 3 (b), if "competent authority" means, inter alia, an authority acting in accordance with and subject to clearly established, fair and impartial procedures.

3.3 He also argues that, far from developing judicial remedies, the State party's courts have held that the author's arguments seeking a remedy for an established violation of the Covenant did not even raise an arguable issue under Irish law. The author notes that the State party has not changed the law so that the courts could give effect to the Committee's Views and provide an effective remedy. On the contrary, the Government opposed the author's applications to the courts at all levels, and actually sought costs against him for doing so. The Supreme Court's determination that the Covenant cannot prevail over convictions pursuant to the Offences Against the State Act means there is no effective remedy for the violation and its continuing effects.

3.4 He also claims that the State party has again violated, or continues to violate, article 26, both alone and in conjunction with article 2. This is as he is still suffering continuing effects, that is to say imprisonment further to a conviction in force, of the unreasoned and unjustified decision to try him before the Special Criminal Court. His conviction remains in effect and he has been afforded no remedy. He relies on *Pauger v. Austria* (No. 2),[7] where the Committee found a repeat violation of article 26 arising out of essentially the same facts as it had already found to constitute discrimination in the first case.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

4.2 As to the author's claims that he is a victim of a violation of articles 2 and 26 as a result of the failure of the State party to provide him with an effective remedy, the Committee notes that this claim is not based on any new factual developments related to the author's rights under the Covenant, beyond his so far unsuccessful attempt to obtain a remedy that he would consider effective in respect of a violation of the Covenant already established by the Committee. In the circumstances, the Committee considers that the author has no claim under the Covenant that would go beyond what the Committee has already decided in the author's initial communication to it. This part of the communication is therefore inadmissible under articles 1 and 2 of the Optional Protocol.

4.3 As to the author's arguments that the State party continues to send individuals for trial before the Special Criminal Court, in breach of article 26, without providing appropriate justification for such an action, the Committee observes that this claim is in the nature of an *actio popularis*, relating as it does to further actions taken by the State party in respect of third parties rather than the author himself. It follows that the author is not personally a victim of these new alleged violations of the Covenant complained of, and this portion of the claim is inadmissible under article 1 of the Optional Protocol.

5. The Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 2, of the Optional Protocol;

(b) That this decision shall be communicated to the author, and, for information, to the State party.

Notes

[1] Following that direction, he was convicted and sentenced to two terms of 12 years and one term of 5 years imprisonment, all running from July 1994. His appeal against conviction and sentence was dismissed.

[2] Communication 819/1998, at paragraph 12.

[3] Ibid.

[4] No substantive reply was ever received to this letter.

[5] Article 29 (3) provides: "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States."

[6] *A. v. Australia* (Communication No. 560/1993, Views adopted on 4 March 1997), *Kelly v. Jamaica* (Communication No. 537/1993, Views adopted on 17 July 1996), *Ex-Philibert v. Zaire* (Communication No. 90/1981, Views adopted on 21 July 1983), *Massiotti v. Uruguay* (Communication No. 25/1978, Views adopted on 26 July 1982).

[7] Communication No. 716/1996, Views adopted on 25 March 1999.

DD. Communication No. 1142/2002, *Van Grinsven v. The Netherlands** (Decision adopted on 27 March 2003, seventy-seventh session)

Submitted by:	Mr. A.J. v. G.
Alleged victims:	The author and his two children
State party:	The Netherlands
Date of communication:	21 November 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 March 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 21 November 2002, is A.J. v. G., of dual Dutch and American citizenship, born in 1961, who submits a complaint on behalf of himself and his two children. He claims violations by the Netherlands of the International Covenant on Civil and Political Rights, articles 7 and 8, article 14, paragraphs 1, 2, 3 (a)-(d) and (g) and paragraph 5, articles 15 and 17, article 23, paragraph 1, article 24, paragraph 1, and article 26. He is not represented by counsel.

The facts as submitted

2.1 According to the author, in June 1998 the author's wife attempted to kill their two children. Subsequently, the children remained in the sole custody of the author, and his wife was made to follow psychiatric treatment. The author filed for divorce in December 1998.

2.2 In July 1999, the Court (Rechtbank) in 's-Hertogenbosch awarded joint custody to the parents, but decided that the children should live with their mother. However, when the mother came to pick up the children from the author's house in August, the author killed her. The author claims that he killed his wife in order to protect his children from their mother. On 12 September 2001, on appeal the Court (Gerechtshof 's-Hertogenbosch) convicted the author of the murder of his wife. He was sentenced to six years' imprisonment.

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* The following members participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Despasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfil Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada,, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieriszewski and Mr. Maxwell Yalden.

2.3 On 13 March 2000, the first instance court (Rechtbank 's-Hertogenbosch) decided to withdraw child custody from the father and the author's application for visits and telephone contact with his children was denied. On 12 July 2000, the Court of Appeal (Gerechtshof 's-Hertogenbosch) ordered further examination of the children's situation and needs. Subsequently, in its decision of 2 January 2002, the Court of Appeal confirmed the lower court's decision that it is in the interest of the children not to visit or to have telephone contact with their father. On 12 February 2002, the author's lawyer provided him with detailed advice on why an appeal in cassation would have no chance of success. He explained that since the author's complaint was based only on the court's evaluation of facts and evidence, it could not be appealed further.

2.4 On 4 September 2002, the European Court of Human Rights declared the author's communication inadmissible on the basis that it did not disclose an appearance of violation of articles of the Convention.

Complaint

3.1 The author claims that he and his children have been subjected to mental torture and cruel, inhuman and degrading treatment, by withdrawing his custody rights, refusing him to meet and talk to his children, and censoring his mail from 15 August 1999 to 15 January 2002, in violation of article 7 of the Covenant.

3.2 The author claims that he and his children are being held in servitude of the State, in violation of article 8 of the Covenant.

3.3 He further claims that they have not been treated equally before the courts and that the custody proceedings were not fair, involving a single judge only at the Family Court hearing of 13 March 2000, in violation of article 14, paragraph 1, of the Covenant.

3.4 He claims that he killed his wife only to protect his children and should therefore not have been convicted, the conviction being in violation of article 14, paragraph 2 of the Covenant.

3.5 He claims that in the custody case, he was not being informed of the charges against him, that he was not given adequate time or facilities for the preparation of arguments as the charge against him was changed abruptly, that the custody case was delayed unduly from the time the author first requested a hearing on 29 September 1999 until the decision on 2 January 2002, that his arguments in court were neglected, that he was compelled to renounce his parental rights, and finally that he was not entitled to a review by a higher court or tribunal, in violation of article 14, paragraphs 3 (a)-(d) and (g), and paragraph 5.

3.6 He claims that the courts imposed a heavier penalty on him than prescribed by law in the child custody case, in spite of his good behaviour, and that he was denied the right to benefit from lighter penalties prescribed by law, in violation of article 15 of the Covenant.

3.7 The author claims that he has not been protected from unlawful interference with his privacy or family, or from unlawful attacks on his honour, reputation or dignity, in violation of article 17 of the Covenant.

3.8 He further alleges that he and his children have not been protected as a family, in violation of article 23, paragraph 1, and article 24, paragraph 1, of the Covenant.

3.9 The author finally claims that he has been discriminated against, on the basis of sex, and of his detention, with regard to his custody rights. Since the Supreme Court decided, in an earlier case decided on 2 December 1958, that parental detention was no basis of loss of the guardianship of children, the author should not have lost his custody rights by account of his detention.

Issues and proceedings before the Committee

4. By decision of 4 December 2002, the Committee, acting through its Special Rapporteur on new communications, decided to separate the Committee's consideration of the admissibility and the merits of the case.

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.

5.3 The Committee notes that the author has not provided any substantiation for his contention that he and his children have not been treated equally before the courts and that the custody proceedings were unfair and hence in violation of article 14. Consequently, the Committee finds these claims to be inadmissible under article 2 of the Optional Protocol.

5.4 With regard to the author's claim related to article 14, paragraph 2, of the Covenant, the Committee notes that the author has failed to substantiate, for purposes of admissibility, his claim that he was not presumed innocent until proven guilty. Accordingly, this part of his claim is inadmissible under article 2 of the Optional Protocol.

5.5 With regard to the author's claims under articles 17, 23, 24, and 26, the Committee considers that the author has not substantiated, for purposes of admissibility, why the loss of parental rights, under the circumstances, would amount to violations of these Covenant provisions. These claims are thus also inadmissible under article 2 of the Optional Protocol.

5.6 With regard to the author's claim that he and his children were subjected to mental torture and cruel, inhuman and degrading treatment, the Committee notes that, in the circumstances of the case, the withdrawal of custody rights from the author, the refusal to let him meet and talk to his children, and the censoring of mail to his children, do not fall under the scope of article 7 of the Covenant. Furthermore, the Committee considers that the claim that the author and his children are being held in servitude of the State, in view of the factual circumstances of the case, does not fall within the scope of application of article 8 of the Covenant. Hence, these claims are incompatible with the Covenant and inadmissible under article 3 of the Optional Protocol.

5.7 In respect of the author's claim that the courts imposed a heavier penalty on him than prescribed by law and that he was denied the right to benefit from lighter penalties prescribed by law, in violation of article 15, the Committee notes that this Covenant provision relates to criminal offences, whereas the author's claim relates to the child custody case. The material before the Committee does not support any argument or claim that those proceedings related to a "*criminal charge*" or a "*criminal offence*" within the meaning of article 15 of the Covenant. This claim and any part of the author's claims that potentially relate to the presumed applicability of article 14, paragraph 3, of the Covenant to the custody proceedings are outside the scope of the Covenant provisions invoked by the author, and inadmissible, *ratione materiae*, pursuant to article 3 of the Optional Protocol.

6. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the author, and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

EE. Communication No. 1169/2003, *Hom v. Philippines**
(Decision adopted on 30 July 2003, seventy-eighth session)

Submitted by:	Mr. Antonio Hom
Alleged victim:	The author
State party:	The Philippines
Date of communication:	20 December 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 July 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication is Antonio Hom. He claims to be a victim of a violation by the Philippines of his rights under articles 1, paragraph 2, 14, paragraph 1, and 26 of the Covenant. The author, a member of the bar, is not represented by counsel.

The facts as presented

2.1 On 3 October 1992, the author, who had retired in 1987 from employment with the Philippine National Bank, brought an action for a sum of money against the bank. He claimed that the bank had illegally deducted withholding tax from the money value of his unused leave credits. On 29 June 1994, the Regional Trial Court of Negros Occidental, at first instance, found against the author, determining that the bank had properly applied the relevant taxation law, as it then stood. On 27 October 1998, a bench of three justices of the Manila Court of Appeals dismissed the author's appeal.

2.2 On 25 November 1998, the author moved for review on certiorari of the Court of Appeal's decision on the basis of alleged jurisdictional error. The petition was served and filed by mail, without reasons as to why it was not served and filed in person, as generally required by the applicable rules of procedure.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 On 22 February 1999, the Supreme Court denied the author's motion for review on certiorari of the Court of Appeals' decision, on the basis (i) that the impugned judgement had not been properly certified by a clerk of the court, (ii) that the motion was insufficient in form and substance, and (iii) that the motion had not been personally served.

2.4 On 26 April 1999, the author filed a "motion for reconsideration", arguing that the judgement in question had been properly certified, that his substantive argument was sound, and that there were practical reasons why personal service had not been pursued. On 23 June 1999, the Court finally denied the author's motion for reconsideration of its resolution of 22 February 1999, on the basis that no substantial arguments were raised to warrant such reconsideration.

2.5 On 2 August 1999, the author moved the Supreme Court for reconsideration of its 23 June 1999 decision, making extensive argumentation on the substantive issues of alleged errors of law and miscarriage of justice committed by the lower court. On 8 September 1999, the Supreme Court rejected the author's motion of 2 August 1999, on the basis of procedural rules which excluded consecutive motions for reconsideration from the same party. As a result, on 27 October 1999, judgement was formally entered in the author's case.

2.6 On 25 March 2000, the author complained to the Chief Justice about the denial of his petition for review. On 8 May 2000, a Justice of the Supreme Court responded, explaining that a petitioner had to show prima facie merit in an attack on an appellate decision, without which a petition would be summarily denied. On 26 May 2000, the author again complained to the Chief Justice. On 26 June 2000, the Supreme Court formally noted the author's letter of 25 March 2002 to the Chief Justice, but took no action.

2.7 On 25 August 2000, the author again complained to the Chief Justice. On 21 September 2000, the Chief Justice's Staff Head responded. On 17 October 2000, the author again complained to the Chief Justice's Staff Head contesting the Court's resolution of 22 February 1999. On 24 January 2001, the author complained to the Staff Head, contending that the Supreme Court's decisions of 22 February 1999, 23 June 1999, 26 June 2000 and 8 September 1999, as well as the Associate Justice's letter of 8 May 2000, were in error.

2.8 On 24 January 2001, the Supreme Court, treating the author's letter of 17 October 2000, as a third motion for reconsideration, resolved to "reiterate the bases of its ruling" of 22 February 1999 first dismissing the author's appeal. It detailed that (i) the appellate judgement had not been certified by a clerk of that court, as required, (ii) that the author's petition had not explained his failure to render personal service, and (iii) that the petition, "by any standard, is manifestly insufficient in form and substance", failing to show prima facie any reversible error committed by the appellate court. It accordingly denied the motion.

The complaint

3.1 The author claims a violation of article 1, paragraph 2, of the Covenant in that he has been allegedly deprived of his retirement benefits, which constitute the very means of his subsistence.

3.2 He further claims a violation of article 14, paragraph 1, in that he was allegedly denied both equality before the courts and a fair hearing in determining his rights in a suit at law. In particular, the author contends, firstly, that the Supreme Court did not grant him a hearing, when it stated in its resolution of 24 January 2001 that no further pleading would be entertained in his case. Secondly, the Supreme Court improperly distinguished between certification applied by a Clerk of the Regional Trial Court and a Clerk of the Court of Appeals in finding that procedural requirement not satisfied. Secondly, the Supreme Court decided to treat the author's letter of 17 October 2000 as a third motion for reconsideration, while having earlier decided that it could not receive any further such motions. Thirdly, the Supreme Court improperly rejected his failure to exercise personal service, on the basis that the physical distance involved was obvious and that it had allegedly previously accepted service by mail.

3.3 The author also cites a violation of article 26 as to the equal protection of the law, without further substantiating any argumentation as to this claim.

Issues and proceedings before the Committee

Consideration of admissibility

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

4.2 As to the author's claim under article 1 of the Covenant, the Committee refers to its jurisprudence that, for the purposes of a communication under the Optional Protocol, article 1 cannot on its own be the subject of a communication under the Optional Protocol.[1] Moreover, the author has not presented his communication in the context of any claim of a "people", within the meaning of article 1 of the Covenant. Accordingly, this aspect of the communication falls outside the Optional Protocol *ratione materiae* and *ratione personae*, respectively, and the claim is inadmissible under articles 3 and 1 of the Optional Protocol.

4.3 As to the author's claims under article 14, paragraph 1, the Committee notes that these claims have their origins in a lawsuit by the author concerning the withholding of some 10 per cent in taxes on the value of his unused leave credits upon retirement. To the extent that the communication can be understood as relating to the interpretation of domestic law and further the evaluation of the facts and evidence by the Regional Trial Court, the Committee observes that that the author appealed to the Court of Appeals, which had full authority to address these issues. The Committee refers to its constant jurisprudence that it is not for the Committee to review these issues, unless the appreciation of the domestic courts is manifestly arbitrary or amounts to a denial of justice. The Committee considers that the author has failed to substantiate, for the purposes of admissibility, any such exceptional element in his present case, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

4.4 As to the aspects of the author's claims under articles 14, paragraph 1, and 26 relating to the circumstances of the subsequent refusal of the Supreme Court to review the outcome of his case, the Committee similarly considers that the author has failed to substantiate, for purposes of admissibility, any claim that would raise issues under these provisions. These claims are thus also inadmissible under article 2 of the Optional Protocol.

5. Accordingly, the Committee decides:

(a) That the communication is inadmissible; and

(b) That this decision will be transmitted to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] See, for example, *Ominayak et al. v. Canada*, Case No. 167/1984, Views adopted on 26 March 1990, at paragraph 13.3.
